BEFORE THE SYMPOSIUM ON EMPLOYEE AND LABOR RELATIONS

RECENT DEVELOPMENTS IN DISABILITY DISCRIMINATION CASE LAW[1]

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[1]This represent's Mr. Maxin's own views and does not necessarily reflect the views of the U.S. Department of Labor.

A. Individual with a Disability

Court Cases

Sutton v. United Air Lines, 1999 WL 40788 (U.S.), petitioners with uncorrected visual acuity of 20/200 or worse, but who could see perfectly well with corrective measures (glasses)**,** were not individuals with a disability within the meaning of the Americans with Disability Act. The petitioner's were not subjected to disability discrimination when their applications for commercial pilots were rejected when they failed to meet respondent's minimum requirement of uncorrected visual acuity of 20/100 or better. Three separate ADA provisions, read in concert, lead to the conclusion that the determination of whether an individual is disabled should be made after considering whether measures, such as eyeglasses or contacts mitigate the individual's impairment, and that the approach adopted by the EEOC's guidelines is an impermissible interpretation of the ADA. First, because the phrase "substantially limits" appears in Subsection (A) in the present indicative verb form, the language is properly read as requiring that a person presently--not potentially or hypothetically-- substantially limited in order to demonstrate a disability. A disability exists only where an impairment substantially limits a major life activity, not where it might, could or would be substantially limiting if corrective measures were not taken. Second, because subsection (A) requires that disabilities be evaluated "with respect to an individual" and be determined based on whether an impairment substantially limits the individual's major life activities, the question whether a person has a disability under the ADA is an individualized inquiry. The EEOC's guidelines directive that persons be judged in their uncorrected or unmitigated state runs directly counter to this mandated individualized inquiry. The former would create a system in which persons would often be treated as members of a group having similar impairments, rather than as individuals. It could also lead to the anomalous result that courts and employers could not consider the any negative side effects suffered by the individual resulting from the use of mitigating measures, even when those side effects are very severe. Finally, and critically, the Congressional finding that 43 million Americans have one or more physical or mental disabilities, see section 1201(a)(1), requires the conclusion that congress did not intend to bring under the ADA's protection all those whose uncorrected conditions amount to disabilities. That group would include more than 160 million people. Because petitioner's allege that with corrective measures their vision is 20/20 or better, they are not actually disabled under subsection (A).

Albertson's, Inc. v. Kirkingburg, 1999 WL 407456 (US) applicant for a truck driver's job, who was examined to see if he met the Department of Transportation's basic vision standards for commercial truck drivers, which required corrected distant visual acuity of at least 20/40 in each eye was not an individual with a disability under the ADA , despite his amblyopia which left him with uncorrectable vision of 20/200 in one eye--in effect monocular vision, since he failed to show that the impairment substantially limited his major life activity of seeing. First, petitioner's impairment did not constitute a "significant restriction" in his ability to see. The court below

found only that there was a "difference" between the manner in which petitioner sees and the manner in which most people see. Second, the court below improperly appeared to suggest that it need not account of a monocular individual's ability to compensate for the impairment, eve though it acknowledged that petitioner's brain had subconsciously done just that. Mitigating measures, however, must be taken into account in judging whether an individual has a disability, whether the measures are artificial aides like medications and devices, or with the body's own systems. Some impairments may invariably cause a substantial limitation of a major life activity, but monocularity is not one of them, for that category embraces a group whose members vary by, e.g., the degree of visual acuity in the weaker eye, the extent of their compensating adjustments, and the ultimate scope of the restrictions on their visual abilities.

Murphy v. United Parcel Service, 1999 WL 407472 (US), petitioner's hypertension was not a disability because his doctor testified that when medicated petitioner functions normally in everyday activities. He was not regarded as disabled because the employer did not terminate him on an unsubstantiated fear that he would suffer a heart attack or stroke, but because his blood pressure exceeded the Department of Transportation's requirements for commercial vehicle drivers.

Cleveland v. Policy Management Systems Corporation, 119 S.Ct. 1597 (1999), claims for Social Security Disability Insurance (SSDI) benefits and for damages under the ADA do not inherently conflict to the point where courts should apply a special negative presumption that receipt of SSDI benefits estops the recipient from pursuing an ADA claim. SSDI does not take into account the possibility of "reasonable accommodation" in assessing claims.

Bragdon v. Abbott, 118 S.Ct. 2196 (1998) patient infected with the human immunodeficiency virus (HIV) brought an action under the ADA against a dentist who refused to treat the patient in his office. The Supreme Court, in a 5-4 decision held that HIV infection is a disability under the ADA, even when the infection has not yet progressed to the so-called symptomatic phase, as a physical impairment which substantially limits the major life activity of reproduction. The Court rejected the petitioners argument that Congress only intended the ADA to cover those aspects of a person's life which have a public, economic, or daily character. Rather, the test is whether the impairment substantially affects a "major" life activity. The Court found that reproduction could not be regarded as any less important than the major life activities of working and learning than are listed in the regulations. The Supreme Court remanded the case, however, for a determination of whether treatment of the disabled plaintiff created a "direct threat" to the health and safety of others (see Direct Threat section of this outline for more detail concerning this aspect of the opinion).

Criado v. IBM Case Nos. 97- 1341 and 1342 (1st Cir. June 5, 1998) employee suffering from depression was an individual with a disability where stress and anxiety was making it difficult to perform her job and her sleep deprivation was affecting her timeliness and ability to report to work. Thus her depression adversely affected her ability to work, sleep and relate to others. That she had been treated successfully for her depression for 7 years and is expected to be treated

successfully in the future does not affect her status as an individual with a disability. ***But see Soileau* v. *Guilford of Maine,*** 105 F.3d 12, 15 (1st Cir. 1997) (finding episodic depression did not substantially limit any major life activities).

Sherrod v. American Airlines, Case No. 97-10011 (5th Cir, January 28, 1998) flight attendant with neck injury who was medically disqualified from her position because she could only lift 45 pounds occasionally and 25 pounds frequently was not a disabled employee. She was only precluded from working in a particular job, not a class of jobs and did not have a record of a disability and was not regarded as disabled.

Burgard v. Super Value Holdings Inc., 1997 U.S. App. Lexis 12228 (10th Cir. 1997), warehouse worker with back impairment who was restricted from lifting 25 pounds frequently and 50 pounds occasionally, was not an individual with a disability, because such lifting restrictions did not substantially limit the employee's life activities. His back impairment prevented him from only performing a narrow range of warehouse jobs, not a class of jobs or broad range of jobs in various classes.

Sieman v. AT&T, 1997 U.S. App. Lexis 11785 (10th Cir. 1997), employee who suffered from severe depression and anxiety was not disabled because the impact of his mental impairment prohibited him only from working under the immediate chain of command of his supervisors, in which he had a stress provoking work relationship. His impairment did not preclude him from working in a broad range of jobs, particularly when he alleged could perform the same job outside of this chain of command.

Foreman v. Babcock and Wilcox Co., 1997 U.S. App. Lexis 11977 (5th Cir. 1997), employee with heart condition was not "substantially limited" in a major life activity and therefore not disabled because his impairment only adversely impacted his ability to perform his job of "expeditor", responsible for delivering materials and supplies necessary to expedite the manufacturing process and not a class of jobs. Nor was the employee regarded by the employer as disabled since he was not perceived by the employer to be generally foreclosed from the type of employment involved.

McKay v. Toyota Motor Manufacturing, 110 F.3d 369 (1997), inability to lift more than 10 pounds was not a disabling condition since it only prevented her from performing a narrow range of manufacturing jobs and would not significantly restrict her ability to perform a broad range of jobs in various classes.

Lowe v. Angelo's Italian Foods, Inc., 87 F.3d 1170, 1174 (1996), lifting is a major life activity and that inability to lift more than 15 pounds creates genuine issues of material fact as to whether the impairment substantially limits the ability to lift.

Weiler v Household Finance Corp., 101 F.3d 519 (7th Cir. 1996), plaintiff did not prove that her anxiety and depression substantially limited her in any major life activities enumerated in the

regulations. Further, plaintiff's inability to get along with her particular supervisor is not a substantial limitation of the major life activity of working because it only precludes the plaintiff in performing in a single job and not a broad range or class of jobs.

Kelly v. Drexel University, 94 F.3d 102 (3rd Cir. 1996), plaintiff who suffered from severe post-traumatic degenerative joint disease of the right hip, could not walk more than a mile, could not jog and had to pace himself slowly was not disabled because he was not substantially limited in his ability to walk.

Pritchard v. Southern Company Services, Inc., 92 F.3d. 1130 (11th Cir. 1996), the employee was not substantially limited in the major life activity of working where she could work in any position not involving nuclear work. This was not a limitation on her ability to work in a broad range of jobs. However, the court allowed the issue of whether the depression and dysautonomia substantially limited her in a major life activity to go to the jury where she had symptoms such as profound fatigue, difficulty sleeping and communicating, difficulty concentrating and experiencing suicidal thoughts.

MSPB Cases

Shestak v. Social Security Administration, 1999 WL 1029155 (November 1, 1999) the MSPB upheld the decision of an arbitrator to sustain the demotion of a GS-11 Claims Representative (CR) position to a GS-8 Contract Representative position with pay retention based upon her inability to perform all of the essential functions of her job because of her medical condition (post traumatic stress disorder and depression). The arbitrator found that she was unable, because of her medical condition, to perform an essential function of the CR position namely, face to face interviews. The arbitrator found that the employee was not disabled because, when taking into consideration the medications she was taking, the impairment did not substantially limit a major life activity. The MSPB found this analysis consistent with ***Sutton v. United Airlines***, 119 S.Ct. 2139, 2143-2146 (1999) and ***Murphy v. United Parcel Service Inc.,*** which provide that measures that mitigate the affects of the individuals impairment, such as medication, should be considered when assessing whether the impairment has a substantial affect on a major life activity. The appellant also complained that the agency did not bear the burden of proving that the ability to engage in face to face interviews was an essential function of the job. The MSPB found that there was a split in the courts and no direct EEOC guidance on who has the burden of proving what the essential functions of the job are and since this was an arbitration award they would not disturb it because there was no evidence of clear legal error.

Bond v. Department of Energy, 82 MSPR 534 (1999) employee who suffered from gastroesophageal reflux disease (GED) failed to show that his impairment, or the medication he took for it, Prilosec, substantially limited a major life activity, so as to render him disabled, and (2) penalty of removal for sleeping while on duty would be mitigated to a 60 day suspension, where the employees medical condition and the side effects of the prescription drug he was taking for his condition played a part in the charged misconduct of AWOL and sleeping on the job.

Fox v. United States Postal Service, 81 MSPR 522 (1999) the agency reduced the appellant in grade from a PS-9 Electronics Technician to a PS-3 Custodian when he was unable to attend required training at a particular training center due to his medical condition (hypertension) which prevented him from sitting fro prolonged periods of time in a car, plane or classroom. The AJ erred when he denied the appeal by making no findings of whether the employee was an individual with a disability and by failing to address whether he could have been reasonably accommodated by deferring his training requirement and/or offering him a position at a higher grade level. It was not clear why the AJ concluded the employee was not an individual with a disability or why he considered the penalty appropriate.

Pugh v. United States Postal Service, 81 MSPR 313 (1999) OWCP claimant who suffered from a psychiatric disorder applied for restoration, the employee was entitled to the restoration rights of an employee who was fully recovered from a compensable injury; the agency did not accord the employee the priority consideration to which he was entitled as a fully recovered employee; the employee failed to prove he was regarded as being disabled; and the agency's offer to assign the employee to a PS-03 custodian position as part of settlement negotiations did not amount to an offer to restore the employee. The employee was not regarded as disabled. He failed to show that the agency viewed him as having an impairment that constituted a significant barrier to employment in that it generally foreclosed the type of employment involved. It was not enough to show that the agency regarded the appellant as foreclosed from a particular job, or from a particular place: the agency must regard the impairment as substantially limiting his employment generally.

Browder v. Department of the Navy, 81 MSPR 71 (1999) the disorder of telephone scatologia, which was a form of paraphilia, did not meet the definition of a disability under the Act since such sexual behavior disorders were expressly excluded under the Act (employee was removed for making harassing calls to various dependent wives residing on the base).

Coronia v. Department of Justice, 78 MSPR 201 (May 8, 1998) removal of Supervisory Security Officer, charged with bringing an unauthorized firearm and ammunition onto the grounds of a correctional facility was mitigated to a 30 day suspension. The second charge of conduct unbecoming an officer when appellant communicated to two coworkers that he had previous thoughts of killing his supervisor, was not sustained. The agency had not charged the appellant with "Making Statements to Co-workers that Resulted in Anxiety and Disruption in the Workplace" as provided in *McCarthy v. Department of the Navy*, 67 MSPR 177, 182 (1995) so they could not now argue that the statements caused anxiety or disruption in the workplace. Moreover, the evidence proved that it was not the statements of the appellant that caused any disruption but the embellished retelling of the conversations by the supervisor. The appellant did not mean the statements as a threat but the agency embellished the statements to interpret them as a threat.

The MSPB found that it was the agency's knowledge of appellant's depression coupled with the statements was the reason for the removal. Although appellant suffered from depression he

would not be considered disabled because his mental impairment was temporary in nature, as supported by the expectation of his full recovery and his doctors releasing him to return to work. However, the appellant was covered under the Rehabilitation Act as an individual with a disability because the agency erroneously "regarded" the appellant as disabled and impermissibly relied on his condition when deciding to remove the employee. Thus, the agency engaged in discrimination when it removed the appellant. After a detailed mixed-motive analysis, the Board found that the employee had engaged in misconduct by bringing a firearm on the premises, even if the misconduct was unintentional, and a 30 day suspension was an appropriate penalty. Vice Chair Slave concurred in part and dissented in part. Her dissent was based upon a conclusion that since the removal was impermissibly based upon the agency erroneously regarding the appellant as disabled such discrimination required that the employee be made whole and not be suspended at all.

Patterson v. Department of the Air Force, 74 MSPR 648 (1997), in determine whether an appellant is substantially limited in a major life activity, the major life activity of working should be examined last, and only in the event that the individual is not substantially limited with respect to any other major life activity. If an individual is substantially limited in any other major life activity, no determination need be made regarding whether the individual is substantially limited in working. Thus, an employee suffering from depression, who was substantially limited in her ability to think, concentrate and make decisions, was an individual with a disability.

Stevens v. Department of the Army, 73 MSPR 619 (1997) appellant, a W.G.-5 Materials Handler, who suffered a brain injury which made it difficult to learn and retain information, was an individual with a disability. Both the agency and the AJ improperly concluded that appellant was not disabled because his performance was satisfactory. The Board reversed. It found that there was a nexus between appellant's learning impairment and his AWOL. Specifically, appellant's doctor testified that his impairment adversely affected appellant's ability to maintain an orderly accounting of time in his own mind and that he would therefore be unable to remember and follow, on a consistent basis, agency leave procedures at issue. The Board held that the appellant was disabled because he was substantially limited in his ability to care for himself and in his ability to think, concentrate and make decisions. The Board also concluded that appellant was disabled because he was substantially limited in his ability to perform the life activity of "working". For the life activity of "working" the term "substantially limited" means that an individual is generally foreclosed by his impairment from the type of employment involved. **See 29 C.F.R. 1630.2 (j)**. More generally, the term means (at a minimum) that an individual's impairment significantly restricts him/her with respect to the condition, manner or duration under which he can perform a particular life activity, as compared to the condition, manner or duration under which an average person in the general population can perform the same activity. The appellant was unable to adhere to a regular work schedule as a result of his learning and memory impairments. Since the ability to adhere to a regular work schedule is essential to almost every government position, appellant was generally foreclosed from the kind of employment involved in this case and is disabled from the kind of employment involved her and is disabled from the major life activity of working. Therefore, the appellant was a disabled employee.

Spencer v. Department of the Navy, 73 M.S.P.R. 15 (1997), appellant suffering from sleep apnea was disabled, despite insufficient evidence that his medical condition substantially affected his work or other life activity, when he proved that the agency "regarded" him as disabled. Specifically appellant proved that the agency viewed him as having an impairment that constituted a significant barrier to employment that it generally foreclosed the type of employment involved.

Baker v. United States Postal Service, 71 M.S.P.R. 680 (1996), appellant with permanent toe condition which prevented him from lifting more than 20 pounds, walking for more than two hours a day, pushing or lifting heavy objects or standing for prolonged periods was a disabled employee. His toe condition substantially limited the major life activities of walking and standing. Furthermore, he is foreclosed generally from the type of employment involved, namely, manual labor. His restrictions do not allow him to perform unskilled labor requiring him to be on his feet all day or to carry things.

Yates v. U.S. Postal Service, 70 M.S.P.R. 172 (1996), appellant's temporary knee condition would have permitted him to return to work in approximately 3-6 months would not ordinarily have met the definition of an individual with a disability. However, appellant was regarded as disabled when he was removed for inability to perform his job. The agency's view that appellant, a mail carrier, could not perform an entire class of sedentary jobs, such as window clerk, mail handler and mail processor, was disabled, because the agency erroneously believed the appellant was significantly restricted performing an entire class of jobs.

Groshans v. Department of the Navy, 67 M.S.P.R. 629 (1995) appellant, a GM-13 Contract Specialist was not a disabled employee, despite suffering the medical condition anaphylaxis, which caused her to experience difficulty in breathing when she was exposed to diesel fumes, any type or form of alcohol or certain strong odors. Appellant suffered severe attacks at her workplace and her physician advised the agency that a future allergic reaction could be fatal. The agency removed appellant for medical inability to perform, finding that the nature of her job required her to be present in the particular building. The Board upheld the AJ's finding that appellant was not disabled. The Board found that appellant suffered from a respiratory impairment but that this did not rise to the level of a disability. The Board explained that an inquiry as to whether an employee is disabled for work is an individualized one focusing on whether the particular impairment constitutes for the particular person a significant barrier to employment; the impairment must generally foreclose the type of employment involved. Relevant to this inquiry are the number and types of jobs from which the impaired employee is disqualified , the geographic area to which the employee has reasonable access, and the employee's job expectations and training. An inability to perform a particular job by a particular employee is not sufficient to establish a disability; the impairment must substantially limit employment generally. Appellant had not shown that her condition affects her in a more limited way, either in breathing or working. Thus, it did not affect her ability to exercise and she engaged in scuba diving and swimming. Moreover, appellant was able to perform in other building locations on the base. Thus, she did not prove that she was generally foreclosed from employment as a result of her disability. Moreover, the agency did not regard the appellant as disabled merely because it

removed her for medical inability to perform or used the phrase "reasonable accommodation" in correspondence between the agency and the appellant. The agency was merely responding to appellant's self-identified respiratory impairment. Thus, appellant was not disabled and was properly removed from her position by the agency.

Sublette v. Department of the Army, 68 M.S.P.R. 82 (1995), appellant, suffering from major depression and post traumatic stress disorder (PTSD) was not disabled because he did not show that these conditions substantially impaired his ability to perform his work. To the extent that he did show such an impairment, it was the stresses of his particular work environment, rather than the supervisory nature of the position, that contributed to his purported condition. Appellant was not disabled because he only established that his impairment precluded him from meeting the demands of a particular job, and not that he was foreclosed generally from a type of employment.

Little v. U.S. Postal Service, 66 M.S.P.R. 574 (1995), drug addicted appellant was not entitled to protections of the Rehabilitation Act, since the American with Disabilities Act amended the Rehabilitation Act to exclude current illegal drug users from the definition of an individual with a disability.

Manuel v. Department of Veteran's Affairs, 58 MSPR 424, 428 (1993), appellant with PTSD was not disabled despite proving that she could not return to work unless reassigned or returned to former position after supervisors and co-workers were given sensitivity training, because she could not have established that her psychological impairment foreclosed her generally from the type of employment she had performed, only that it precluded her from meeting the demands of her particular job.

EEOC Cases

Bailey v. Runyon, Postmaster General, U.S. Postal Service, complainant with mild shoulder condition was not disabled, even though he had a 30% service-connected disability, since he was unable to show that his impairment substantially limited a major life activity.

Benitez v. West, 96 FEOR 3023 (1996), GS-3 Data Transcriber suffering from Major Depression was disabled. "The Commission notes that stress and depression are conditions that may or may not be considered impairments, depending upon whether or not a person's impairment substantially impairs a major life activity. The commission recognized three factors which should be considered in determining whether or not a person's impairment substantially limits a major life activity. They are the duration of the impairment, the severity of the impairment, and its permanent and long- term impact " Petitioner had been treated for a two year period of time, and she had been hospitalized for the condition. The psychiatrist also recommended ongoing treatment and voiced concern that the employee had suicidal tendencies. Thus, the employee was disabled.

Curry v. West, Secretary, Department of the Army, 96 FEOR 1100 (1995), applicant's knee and back injuries were not sufficiently severe to be considered disabling conditions. However, the

employee was protected by the Rehabilitation Act because he was *regarded* as disabled by the agency as disabled where the agency erroneously believed that because of his medical condition he could not perform the essential function of the position of GS-11 Electronics Mechanic.

Kinsley v. Runyon, Postmaster General, U.S. Postal Service, 95 FEOR 1251 (1995), employee with insulin dependent diabetes was not disabled. He failed to show that his diabetes substantially limited one or more of his major life activities at the time of his removal.

Dimick v. Runyon, Postmaster General, U.S. Postal Service, 95 FEOR 1146 (1995) , the EEOC found that an epileptic employee was disabled despite the fact that he could perform perfectly well on the job. The agency discriminated against him when it did not grant the accommodation of altering his work schedule. The agency feared that a flood of alternative schedule requests would be made if they granted appellant's request. However, an agency may not decline an accommodation based upon its aversion to setting a bad precedent

Dunn v. Runyon, Postmaster General, U.S. Postal Service, 94 FEOR 3178 (1993), employee with herniated disc in his neck was not disabled when his doctor indicated that his impairment was of temporary duration, i.e. her work restrictions were only in effect for 30 days and the employee would be able to return to full duty within a few weeks to two months.

B. Qualified Individual with a Disability and Reasonable Accommodation

Court cases

Brickers v. Cleveland Board of Education, case No. 97-3364 (6th Cir, July 16, 1998) bus driver was not a qualified disabled person when she was unable to perform as a bus driver and was not entitled to be reassigned as a bus attendant where she could not perform the essential function of lifting. Although this lifting requirement rarely was required on a day to day basis, it was important in the event of an emergency or to care for certain disabled riders.

Criado v. IBM Case Nos. 97- 1341 and 1342 (1st Cir. June 5, 1998) granting an employee a one month leave of absence for their depression was a reasonable request for accommodation and IBM discriminated against the employee when it denied the request and fired him. IBM argued that there was a miscommunication between the employee's doctor and the company and that it removed the employee solely on the basis of his absence from work. However, if the termination was based upon a mistake, the employee should have been reinstated once the employee provide medical evidence clarifying the need for a temporary absence *citing* ***Bultemeyer v. Fort Wayne Community Schools*** 100 F.3d 1281, 1286 (7th Cir. 1996)(holding that although a doctor's letter requesting an accommodation came after a decision to terminate the employer should have reconsidered the decision to terminate).

Hypes v. First Commerce Corporation, Case No. 96-31133 (5th Cir., Feb.12, 1998)

Hypes was hired by FCC in February of 1993, as a Loan Review Analyst assigned to a Consumer Assessment Team in the Independent Review Services Division. He worked in that position until April 27, 1994, when he was reassigned to a Commercial Portfolio Team. Hypes was not "otherwise qualified" for his job because: 1) as the district court correctly concluded, it was an essential function of his job, as a member of a team, that Hypes be in the office, regularly, as near to normal business hours as possible, and that he work a full schedule; and 2) even with the requested flex-time accommodation, Hypes could not arrive at work early enough or often enough to perform the essential functions of the job. The evidence demonstrates that this was not the sort of job which could be done at home. Hypes' job required him to review various confidential loan documents, which could not be taken from the office. "An employer is not required to allow disabled workers to work at home, where their productivity inevitably would be greatly reduced." Vande Zande v. State of Wis. Dept. of Admin., 44 F.3d 538, 544 (7th Cir.1995). Furthermore, he was a part of a team and the efficient functioning of the team necessitated the presence of all members. "[T]eam work under supervision generally cannot be performed at home without a substantial reduction in the quality of the employee's performance." Id. at 544. Therefore, it was critical to the performance of his essential functions for Hypes to be present in the office regularly and as near as possible to normal business hours. Other courts are in agreement that regular attendance is an essential function of most jobs. ***Rogers v. International Marine Terminals, Inc.***, 87 F.3d 755, 759 (5th Cir.1996) ("[a]n essential element of any government job is an ability to appear for work ... and to complete assigned tasks within a reasonable period of time") (quoting ***Carr v. Reno***, 23 F.3d 525, 530 (D.C.Cir.1994)). See also ***Tyndall v. Nat'l Educ. Centers, Inc. of Cal***., 31 F.3d 209, 213 (4th Cir.1994) ("a regular and reliable level of attendance is a necessary element of most jobs"); ***Law v. United States Postal Serv***., 852 F.2d 1278, 1279-80 (Fed.Cir.1988) (holding that "an agency is inherently entitled to require an employee to be present during scheduled work times, and, unless an agency is notified in advance, an employee's absence is disruptive to the agency's efficient operation"); ***Walders v. Garrett***, 765 F.Supp. 303, 309-10 (E.D.Va.1991) (holding that "employees cannot perform their jobs successfully without meeting some threshold of both attendance and regularity[;] the necessary level of attendance and regularity is a question of degree depending on the circumstances of each position, ... however, ... some degree of regular, predictable attendance is fundamental to most jobs"), aff'd, 956 F.2d 1163 (4th Cir.1992); ***Santiago v. Temple Univ***., 739 F.Supp. 974, 979 (E.D.Pa.1990) ("attendance is necessarily the fundamental prerequisite to job qualification"), aff'd, 928 F.2d 396 (3d Cir.1991).

Terrell v. U.S. Air, Case No. 96-2345, (11th Cir. January 6, 1998), employer had no duty to create part- time airline reservations agent position in order to accommodate employee's Carpel Tunnel Syndrome (CTS). Employer did not fail to accommodate employee's carpal tunnel syndrome (CTS), and thus did not violate ADA, when it failed to provide her with full-time use of drop keyboard until 13 months after she requested it, where she was on medical leave for ten of those months, she was not placed on medical leave because of lack of drop keyboard, she had some access to drop keyboard during those three months, and she was not required to type when she had no access. Employee does not satisfy his or her initial burden under ADA of identifying reasonable accommodation by simply naming a preferred accommodation, even one mentioned in

ADA or regulations; employee must show that accommodation is reasonable given his or her situation. In ADA action, burden of identifying accommodation that would allow qualified employee to perform the job rests with that employee, as does ultimate burden of persuasion with respect to demonstrating that such accommodation is reasonable. To reasonably accommodate disability as required by ADA, employer is required only to provide alternative employment opportunities reasonably available under its existing policies.

Kralik v. Durbin, Case No. 97-3106 (3rd Cir. 1997) employee's request to be relieved of forced overtime was not reasonable accommodation. Relieving state employee of forced overtime would have required employer to infringe seniority rights of other employees under collective bargaining agreement and, thus, was not reasonable accommodation under ADA or Rehabilitation Act. The court quoted ***Shea v. Tisch***, 870 F.2d 786, 790 (1st Cir.1989) for the proposition that "an accommodation that would result in other employees having to work[ ] harder or longer hours is not required."

Barber v. Nabors Drilling U.S.A. , Case No. 20102 (5th Cir. 1997), evidence that employee with back injury was capable of performing essential functions of job as toolpusher on oil drilling rig, for purposes of determining whether he was "qualified individual with a disability" under ADA, was sufficient for submission to jury; jury could have reasonably concluded that emergency functions requiring heavy lifting were marginal functions of job. ADA does not require employer to transfer from disabled employee any essential functions of his or her job in order to make reasonable accommodation for disability.

Lyons v. Legal Aid Society, 68 F.3d 1512 (2nd Cir. 1995) the reasonableness of an accommodation depends upon a common sense balancing of the costs and benefits to both employer and employee. An accommodation may not be considered unreasonable merely because it requires the employer to assume more than a de minimis cost or because it will cost more to obtain the same overall performance from a disabled employee.

Foreman v. Babcock and Wilcox Co., supra, a disabled employee must be able to perform the essential functions of the position in question before he is able to be considered a qualified individual with a disability and be covered by the ADA. Plaintiff was not a qualified disabled employee because he was unable to carry materials into the shop area which was an essential function of his job.

Feliberty v. Kemper Corporation, 98 F.3d 274 (7th Cir. 1996), although an employee with a disability has a “substantial responsibility” for identifying the reason for a reasonable accommodation, an employer is not totally relieved of responsibility to determine appropriate accommodations.

Monette v. EDS Corporation, 90 F.3d 1173 (6th Cir. 1996), determining whether a proposed accommodation is reasonable requires a factual determination of reasonableness (perhaps through a cost-benefit analysis or examination of the accommodations undertaken by other employers)

untethered to the defendant employer's particularized situation. Once a determination is made that a proposed accommodation is, in a sense "generally reasonable" the defendant-employer then bears the burden of showing that the accommodation poses an undue hardship upon it.

Hudson v. MCI Telecommunications Corp., 87 F.3d 1167 (10th Cir. 1996), unpaid leave of indefinite duration does not constitute a reasonable accommodation. ***See Monette, supra***.

Beck v. University of Wisconsin Board of Regents, 75 F.3d 1130, 1135-37 (7th Cir. 1996), once an employer knows of an employees disability and the employee has requested reasonable accommodations, the ADA and its implementing regulations require that the parties engage in an interactive process to determine what precise accommodations are necessary. Both parties bear responsibility for determining what accommodation is necessary. In the event the interactive process fails, the court shall determine which party is responsible for the breakdown and then assign responsibility for the failure in deciding whether the employer's decision to deny the accommodation was warranted.

Willis v. Conopco Inc., 108 F.3d 282 (11th Cir. 1997), employee in spare parts department was properly removed from his position because his chemical sensitivity prevented him from coming in contact with any chemically toxic substances in the plant. Plaintiff argued that he was improperly removed and that the employer made no effort to explore possible accommodations for the employee. The court found that where the employee failed to satisfy his burden of articulating a reasonable accommodation, the employer's lack of investigation into potential reasonable accommodations is unimportant. The ADA was not intended to punish employers for acting callously for failure to engage in the "interactive process" as discussed in ***Beck, supra,*** if no accommodation for the employee's disability could reasonably have been made.

Bultemeyer v. Fort Wayne Community Schs., 100 F.3d 1281, 1285 (7th Cir. 1996) citing *Beck*, the Court of Appeals recognized that the interactive process may be particularly difficult in the case of an individual with a mental illness who may not have the means or ability to request an accommodation. In such a case the employer must do what it can to help even if the employee has not specifically asked for an accommodation**.**

Henricks-Robinson v. Excel, Case No 94-3156 (D.C.D. Ill. 1997), the employer's obligation is to grant a reasonable accommodation. It is not obligated to reassign the employee to a better position than he normally would be entitled to because of his/her disability.

MSPB Cases

Laniewicz v. Department of Veterans Affairs, 83 MSPR 477 (1999), removal of medical center operator, who suffered from depression and bipolar disorder, was sustained when she directed a code blue team to the wrong location, and who was abusive and discourteous to a volunteer during the same incident. The Board held that an agency has a duty to provide accommodation only to "otherwise qualified" employees and that as a result of the misconduct appellant could not

be considered "otherwise qualified". The Board cited to many cases supporting the proposition that no accommodation is necessary where the employee committed misconduct which is job-related and inconsistent with business necessity, and the employer does not excuse similar misconduct from non-disabled employees. The Board upheld the penalty of removal. It found that if an employee's medical condition played a part in the misconduct, that fact is entitled to considerable weight as a mitigating factor. However, the appellant testified that her disability played no role in her misconduct, accordingly the removal was sustained.

Robinson v. Department of the Air Force, 77 MSPR 486 (1998), in establishing a prima facie case of disability discrimination, the employee is not required to prove conclusively that specific job accommodations are reasonable, but must only make a facial showing that her disability can be reasonably accommodated. The bare assertion of an employee in an Editorial Assistant position suffering from cervical spondylosis that the agency "did not take precautions to make my working area safer to enable me to perform" and "at no time made preventions, after my job injury, to make the environment safer to alleviate my pain" did not constitute an articulation by the employee of a reasonable accommodation under which she could perform the necessary duties of her Editorial Assistant position. Appellant did articulate a reasonable accommodation when she stated that she could have been reassigned or placed back to her former position of GS-5 secretary position.

Patterson v. Department of the Air Force, 74 MSPR 648 (1997)**,** appellant suffering from depression, was not a qualified disabled employee since she was unable to perform the essential functions of her GS-5 Computer Specialist GS-5 position. The appellant had difficulty in the job from the time of her appointment which led to her dispute that culminated in her emotional breakdown. Further her medical evidence did not affirmatively state that she could perform her job but recommended instead a "friendly approach" on the job, with possible retraining, as if for the first time, and then proceeding in a step by step working relationship to determine "once and for all that she either is capable of learning the job with proper training or in fact cannot do it." Thus appellant had not established that, even with the accommodations of being granted leave and being retrained, she could perform the essential functions of her computer specialist position. Finally, reassignment was not an option because the agency was undergoing a RIF and there were no vacant positions available. Finally, in reaching the decision of whether the appellant was a qualified disabled person, the MSPB distinguished the case of ***Randel v. Department of the Navy***, 72 MSPR 288 (1996), upholding the EEOC's decision in ***Randel v. Dalton,*** 96 FEOR 3230 (1996)(discussed below) where the depressed appellant was deemed qualified based upon his long history of satisfactory performance in the job.

Clark v. United States Postal Service, 74 M.S.P.R. 552 (1997), citing *Beck supra* held that an employee is required to make a good faith effort to work with the agency to determine what constitutes a reasonable accommodation.

Stevens v. Department of the Army, supra, appellant suffering from learning and memory disabilities which caused appellant to be AWOL on 5 separate occasions, was improperly

removed from his W.G.-5 position, when he was able to articulate a plausible reasonable accommodation: permit appellant's sister to be responsible for arranging appellant's leave and attendance, and the agency failed to show that such an accommodation would cause it an undue hardship. The MSPB explained that where a mechanism has been suggested that would limit the job-related effects of an appellant's disability, it will look with some skepticism on an agency's claim that it could not afford to "risk allowing a **trial** of that mechanism."

Baker v. United States Postal Service, supra, an agency must restructure a position to accommodate a disability by removing nonessential functions the employee cannot perform, but such restructuring is not required if tasks the employee is unable to perform are essential to the job. Thus, the agency was not obligated to restructure a Mailhandler position where lifting heavy objects, pushing carts and standing and walking all day--things appellant cannot do because of his toe condition--are at the heart of the position and not incidental to it.

McCray v. Department of Defense, 68 M.S.P.R. 186 (1995), appellant was removed for unacceptable performance. He alleged that his stipulated disability of depression and Post Traumatic Stress Disorder caused his unacceptable performance and the agency discriminated against him when it did not grant his requested accommodation of permitting him to use his accumulated annual and sick leave in lieu of removal. The AJ upheld the removal but in doing so excluded relevant witnesses relevant to the issues of causation, agency knowledge of appellant's disability and reasonable accommodation. The AJ further concluded that the agency's prior efforts to refer the appellant to the Employee Assistance program (EAP) satisfied the agency's obligations under the Rehabilitation Act. The Board remanded the case and instructed the AJ that while an agency need not consider every possible accommodation *ad infinitum* where it has reasonably given consideration to the matter, it should, nonetheless, take actions as necessary to bring fruitful results in order to actually effect an accommodation that enables an employee to perform. Prior accommodation efforts are only relevant insofar as they might indicate that future efforts to accommodate will likely be unsuccessful or that the cumulative efforts of the agency have placed an undue burden upon it at which point further accommodation becomes unreasonable.

Moon v. Department of the Army, 63 M.S.P.R. 412 (1994), restructuring appellant's Engineering Technician position so that she was only required to calibrate smaller items was not a reasonable accommodation where the essential functions of her job required her to calibrate a wide variety of equipment of various weights and sizes and restricting appellant to working on smaller items would essentially be assigning her lower graded GS-4 duties. Moreover, the agency is not required to create a new position in order to accommodate an employee's disability.

Bolstein v. Department of Labor, 55 MSPR 459 (1992), appellant was properly demoted when he could not perform the essential functions of his GS-14 attorney position. The agency demonstrated that the GS-14 attorney position required the appellant to perform the most complex legal work with little or no supervision. Appellant's psychiatrist recommendations more

structure work with closer supervision. Such an accommodation could not be granted without significantly altering the essential functions of the job.

EEOC Cases

Purcell v. West, Secretary, Department of Veterans Affairs, 1999 WL 448126 (EEOC), alcoholic employee was properly removed from the agency for poor performance. Agency was not obligated to provide a firm choice between treatment and removal. Further, appellant did not inform the agency of her poor performance until after she received the performance appraisal. The request for a firm choice amounted to a "retroactive excuse" for her poor performance. Even though the agency had reason to suspect that the employee was an alcoholic, it is the responsibility of the individual with a disability to request the accommodation. An employer is only obligated to initiate discussion of reasonable accommodation when (1) it knows the employee has the disability; (2) it knows or has reason to know that the employee is experiencing workplace problems because of the disability; and (3) it knows or has reason to know that the disability prevents the employee from requesting accommodation. Notwithstanding that the agency suspected the existence of a disability, the conditions which would have triggered a further duty to inquire were not met. Further, reasonable accommodation is always prospective, meaning that even once appellant disclosed her disability and requested reasonable accommodation, she was entitled to accommodation only from the date of such disclosure and request forward. Moreover, an employer is not required to excuse an employee from meeting conduct and performance standards that are uniformly applied , job-related, and consistent with business necessity, although the employer must make reasonable accommodation to help the employee meet the standards in the future if the employee is retained following a violation of such standard.

Christian v. Henderson, Postmaster General, U.S. Postal Service, 99 FEOR 1124 (March 10, 1999) the overturned an EEOC AJ decision and found that the agency improperly terminated a probationary employee with a learning disability where the disability adversely affected his performance as a part-time flexible mail carrier. The supervisor learned from the employee that his disability was adversely affecting his performance just prior to taking the performance action. (The supervisor asked the employee why he was so slow delivering the mail and frequently returned undelivered mail to the post office. The employee responded "IF have a learning disability." The supervisor responded "You do?" The employee responded in the affirmative. Further six days prior to his termination he informed his supervisors that he was a very slow learner.) Rather than explore reasonable accommodation the agency fired the employee. "If the agency questioned the validity of the appellant's statements concerning his disability, they then had an affirmative obligation to ask appellant for a reasonable documentation about his disability and functional limitations and/or refer appellant for a fitness for duty examination, *EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act (March 1, 1999).* The record evidence shows that the agency officials did neither." The only way that the agency could show that it was not obligated to provide a reasonable accommodation is to show that the needed accommodation, more time to deliver his routes or on the same routes for six months and then add more-constituted an undue

hardship. The agency did not provide evidence of undue hardship. Therefore reinstatement was ordered seven years after the fact.

Patterson v. Widnall, Secretary, Department of the Air Force 98 FEOR 3136 (1998) the EEOC differed from the MSPB and found disability discrimination when the agency failed to accommodate her mental condition (depressive disorder) by granting her request for leave or by trying to fulfill her request for reassignment. The employee had submitted several doctors notes to support a two week leave of absence which the agency felt were insufficient to support the request for leave. Regarding reassignment, there was no "systematic search for vacant positions", therefore the agency did not satisfy its duty to reasonably accommodate appellant.

Smith v. Herman, Secretary, Department of Labor, EEOC Petition No. 03970145 (December 12, 1997) the EEOC upheld the MSPB's decision finding no discrimination, when the agency separated the appellant from her GS-12 training position. The appellant suffered from depression and alleged she was unable to perform her job in the office. The agency had offered alternative accommodations, such as a flexible work schedule and a part-time position, which the appellant rejected. The EEOC ruled that an employee is entitled to a reasonable accommodation, not an accommodation of choice. A reasonable accommodation must always take into consideration two unique factors: the specific abilities and limitations of a particular employee with a disability; and the specific functional requirements of a particular job. In this case the appellant's position required that she be at the work site and the agency had offered reasonable accommodations which the appellant rejected, therefore the removal was sustained.

Saunders v. Dalton, Secretary, Department of the Navy, 97 FEOR 3126 (1997)(EEOC remanded removal case back to the MSPB to determine, in part, whether the duties appellant could not perform were non-essential duties and whether his job could be restructured to eliminate those duties);

Luellan v. Runyon, Postmaster General, U.S. Postal Service, 97 FEOR 3070 (1996) , appellant's disability prevented him from being exposed to noise levels greater than 50 decibels and the agency discriminated when it failed to measure the noise level in his newly assigned area to meet his restrictions. The EEOC recognized that it is "the responsibility of an appellant to cooperate in an agency's efforts to reasonably accommodate the appellant's disability." The evidence was conflicting regarding the appellant's willingness to cooperate. However, there was no explanation as to why, given that it was on notice of the noise restriction levels of appellant, that it did not attempt to measure the noise level in the room to which he was assigned or to make any accommodation efforts. ***But See Edward v. Runyon***, 96 FEOR 1075 (1995) the agency discriminated when it did not show that the creation of a light duty position would have caused an undue hardship.

Meyer v. West, Secretary, Department of the Army, 96 FEOR 3234 (1996), the agency violated the Rehabilitation Act when it failed to explore restructuring complainant's current position or reassignment as a reasonable accommodation. The agency ignored the recommendations of

complainant's doctor and the EEOC opined that the agency's system for identifying and accommodating disabled employees was inadequate. Various offices within the agency responsible for considering reasonable accommodations failed to communicate with each other or the complainant's supervisors.

Randel v. Dalton, 96 FEOR 3230 (1996), wherein the EEOC reversed the MSPB and found that an employee who suffered from depression and had difficulty thinking and concentrating was an individual with a disability and was a qualified individual with a disability based upon his ability to perform in the job successfully for several years. Despite medical evidence that appellant suffered from depression, the supervisor concluded that the employee was not depressed and did not meaningfully consider the requested accommodations of leave and reassignment in violation of the Rehabilitation Act..

Benitez v. West, 96 FEOR 3023 (1996), a GS-3 Data Transcriber suffering from depression was not a qualified disabled employee when he requested that her standards be lowered and that she retrained by another supervisor. "By lowering her standards, petitioner is asking that one of her essential functions of her position be eliminated, and such action is not required under the Rehabilitation Act. Nor is the agency obligated to provide petitioner with every accommodation she may request."

Wilson v. Chater, Acting Director, Social Security Administration, 96 FEOR 1209 (1996), the agency violated the Rehabilitation Act when it did not carefully follow the recommendations of a work evaluation specialist (WES) concerning complainant's Carpel Tunnel Syndrome. The EEOC did, however, uphold the decision of the agency not to provide the complainant with an upgraded computer, which appellant proposed to reduce his keystrokes. The EEOC found that this recommendation by the WES was not based upon the WES' personal observations and professional expertise.

White v. Brown, Secretary, Department of Veterans Affairs, 95 FEOR 1142 (1995) , the agency has dual obligations under the rehabilitation Act. Agencies shall not discriminate against a qualified individual with a physical or mental disability. Furthermore, agencies shall make reasonable accommodations to the known physical or mental limitations of an applicant or employee who is a qualified individual with a disability. Employee with post concussion syndrome and PTSD was not entitled to accommodation of his choice, only a reasonable accommodation.

C. Reassignment of Disabled Employees

Court Cases

Keever v. Middletown, Case No. 97-3078 (6th Cir., May 29 1998) city's offer of a desk position with similar pay and benefits but significantly reduced police officers physical and mental responsibilities was reasonable under the ADA despite the officer's preference for another position

where desk position would allow the officer to have frequent absences without disrupting the department, officer's routine duties on street exacerbated his injuries and the officer had lifting restrictions which could be accommodated in the desk job.

The ADA requires reassignment to a vacant position when the employee is no longer able to perform the essential functions of her employment, even with a reasonable accommodation, and the employee is qualified for the vacant position. We circumscribed the employer's obligation to reassign a disabled employee, however. An employer need only provide a reasonable accommodation, not necessarily the accommodation the employee requests. An employer is not obligated to "bump" another employee in order to create a vacancy for the disabled employee. And the employer does not have to create a new position for the disabled employee. The plaintiff bears the burden of showing that a vacant position exists and that the plaintiff is qualified for that position. See ***Stewart v. Happy Herman's Cheshire Bridge, Inc.***, 117 F.3d 1278, 1286 (11th Cir.1997); ***Mengine v. Runyon***, 114 F.3d 415, 419 (3d Cir.1997); ***Miller v. Department of Corrections of the State of Illinois***, 916 F.Supp. 863, 870 (C.D.Ill.1996), aff'd, 107 F.3d 483 (7th Cir.1997). Here McCreary needed to show that a vacant position in quality control was available at the time LOF fired him. See ***Weiler v. Household Fin. Corp***., 101 F.3d 519, 524 (7th Cir.1996) (holding that the relevant time is the time of the employment decision). He has not done so. McCreary has not put forth any evidence that a vacant position in quality control was available. Rather, he testified that he sometimes worked in the quality control department but only when there was no work in the soldering department for some reason. This is insufficient. Occasional opportunities to work in another department are not equivalent to a vacancy for a permanent position. Pointing to a current vacancy is required because "Congress did not intend that other employees lose their positions in order to accommodate a disabled coworker." ***Eckles v. Consolidated Rail Corp***., 94 F.3d 1041, 1047 (7th Cir.1996), cert. denied, --- U.S. *1166 ----, 117 S.Ct. 1318, 137 L.Ed.2d 480 (1997). McCreary has not identified a genuine issue of material fact regarding the possibility of reassignment. As such, the district court properly granted summary judgment on the reasonable accommodation claim.

Woodman v. Runyon, Case No. 96-4104 (10th Cir. 1997) employee bears burden of production with respect to plausibility of reasonable accommodation. This burden is not a heavy one; employee met burden of making facial showing that reasonable accommodation through permanent reassignment was plausible. Under Rehabilitation Act, employers are not required to initiate inquiry into whether employee with disability can be accommodated. Once the employee initiates, however, the Rehabilitation Act requires interactive process whereby federal employers investigate in good faith the availability of positions to which disabled employees could be reassigned. To meet its burden under Rehabilitation Act, employer may not merely speculate that suggested accommodation is not feasible; when accommodation is required to enable employee to perform essential functions of job, employer has duty to gather sufficient information from employee and qualified experts as needed to determine what accommodations are necessary to enable employee to perform job. To initiate interactive process required by Rehabilitation Act, it is enough for the employee to notify employer of nature of his or her disability and specifically request information about possible reassignment, and at that point, the employer is obliged to

assist in effort to identify an available job; however, the employee may be given other duties as interactive process unfolds. Here the employee met her burden under Rehabilitation Act by requesting reasonable accommodation and making facial showing that reasonable accommodation through permanent reassignment was plausible, where she contended that certain position she had performed without difficulty could become her permanent job, she repeatedly and specifically requested that employer assist her in locating other jobs she might do, and she underwent several arduous functional capacity evaluations.

Schmidt v. Methodist Hospital, 89 F.3d. 342 (7th Cir. 1996), an employer is not obligated to provide an employee the accommodation he requests or prefers, if an alternative reasonable accommodation is offered. If an employee requests reassignment and the employer offers a reasonable accommodation in his current job, the employer need not agree to reassign the employee.

Wernick v. Federal Reserve Bank, 91 F.3d 379 (2nd Cir. 1996), not every request for an accommodation is reasonable. The employee requested a new manager to alleviate the stress caused by their relationship. The agency refused the reassignment, but offered ergonomic accommodations to permit the employee with a back impairment to perform her job. The court held that the agency attempted to reasonably accommodate the employee and the employer was not required to make a supervisory switch merely to accommodate the employee's preference in managers.

MSPB Cases

Fox v. United States Postal Service, 81 MSPR 522 (1999), case was remanded to determine whether employee was properly demoted because he was unable to attend training at a certain training center due to his medical condition, hypertension, which prevented him from sitting for long periods of time in a car, plane or classroom. The case was remanded to determine whether the employee was disabled and whether attending the training constituted an essential function of his job reasonable accommodation when an employee becomes unable to perform the essential functions of his position even with reasonable accommodation due to a disability, an agency shall offer to reassign the employee to a funded vacant position that the employee will be able to perform with or without reasonable accommodation. In the absence of a position at the same grade or level, an offer of reassignment to a vacant position at the highest level available grade or level below the employee's current grade or level is appropriate. An involuntary demotion does not constitute a reasonable accommodation.

Jackson v. United States Postal Service, 79 MSPR 46 (1998) although the agency violated its obligation under the Rehabilitation Act to identify vacant funded positions in the same commuting area, at or below the disabled employee's grade level for which she could have been reassigned, this violation was not harmless since there were no such positions available.

Robinson v. Department of the Air Force, 77 MSPR 486 (1998), an agency's obligation to accommodate includes reassignment to a vacant position at the same grade or level the essential functions of which the employee can perform, and if such a position is not vacant, an offer of reassignment to the highest available grade or level below the employee's current grade is required. An agency is not, however, obligated to accommodate a disabled employee by permanently assigning him to light-duty tasks when those tasks do not comprise a complete and separate position. In establishing a prima facie case of disability discrimination, the employee is not required to prove conclusively that specific job accommodations are reasonable, but must only make a facial showing that her disability can be reasonably accommodated. The employee articulated a reasonable accommodation when she requested that she either be reassigned from her GS-5 Editorial Assistant position or placed back in her former GS-5 Secretary position which she had no problems fulfilling or performing for 9 years. The case was remanded to determine whether she could meet her burden to show that she was qualified to perform the essential functions of any one of the vacant positions including her former Secretary position. While it could be inferred that employee could perform her previous position the employee presented no direct evidence that she could in fact perform this position.

Jackson v. United States Postal Service, 73 MSPR 512 (1997), appellant, a Custodial Laborer, PS-3, at the U.S. Postal Service, was improperly removed from her position on a charge of failure to meet the physical requirements of her position. Appellant, who suffered from dermatitis and a heightened sensitivity to chemicals, was medically unable to perform her job because it exposed her skin to chemicals that adversely effected her health. The Board reversed the removal, finding that the appellant had made a facial showing that her disability could be accommodated when her doctors recommended that she be reassigned to a position with no contact with chemicals. It was then the agency's burden to prove that such a reassignment would cause an undue hardship. Since the agency mistakenly concluded, based on its review of the medical evidence, that appellant could not perform anywhere in the main post-office building and improperly interpreted the collective bargaining agreement to preclude reassignment of the appellant, it never made an effort to determine whether the appellant could be reassigned to funded vacant positions located in the same commuting area, serviced by the same appointing authority, at the same grade or level for which she was qualified. Accordingly, the agency action was reversed. ***Compare McAlpin v. National Semiconductor Corp.,*** 921 F.Supp. 1518 (N.D. Tex. 1996); ***Guillory v. Department of the Navy***, 50 M.S.P.R. 244, 252 (1991).

Baker v. United States Postal Service, supra, the agency did not discriminate against the appellant when it did not reassign him to a vacant position when the appellant did not even identify a type of job in which he believed he could have been accommodated.

O'Connell v. United States Postal Service, 69 M.S.P.R. 438 (1996), appellant raised a non-frivolous allegation of coerced demotion when he alleged that the agency would not accommodate his disability. An agency's obligation to accommodate an employee with a disability includes reassignment to a vacant position at the same grade or level the essential functions of

which the appellant can perform. If a position at the same grade is not vacant, an offer of reassignment to the highest available grade below the employee's current grade is required.

Phillips v. Department of the Navy, 67 M.S.P.R. 74 (1995), appellant was removed for physical inability to perform which was upheld by the AJ. The appellant appealed arguing that the agency failed to reassign him to a suitable vacant position. The Board remanded the case back to the AJ to gather a complete record regarding vacant funded positions for which the appellant was qualified. The appellant articulated reassignment as a plausible reasonable accommodation. The agency is expected to no more than the appellant about the availability of positions that could be filled by employees with certain medical restrictions. Accordingly, the agency had a duty to explore reassignment of appellant to a funded vacant position located in the same commuting area and serviced by the same appointing authority, and at the same grade or level, the essential functions of which the appellant would be able to perform with reasonable accommodation unless the agency could show the reassignment would cause it an undue hardship. If there were no positions at the same grade it was responsible for searching for vacant positions at the highest grade below appellant's current grade. See 29 C.F.R. 1614. 203 (g). The agency did not enter into evidence the list of positions it considered when deciding where it could reassign the appellant. The personnel specialist who actually did the search for vacant positions did not testify, and those individuals that did testify for the agency did not have first hand knowledge of the search and were not familiar with the scope and extent of the search. Thus, the evidence on the sufficiency of the search for vacant positions was inconclusive and warranted a remand.

Sheehan v. Department of the Navy, 66 M.S.P.R. 490 (1995), as a general rule, a disabled employee is not entitled to an accommodation which affords him/her rights superior to those enjoyed prior to the onset of his/her condition or to those of other non-disabled employees. However, the MSPB reversed an agency when it refused to offer an employee a vacant position he was well qualified for and which had promotion potential to a higher grade than the position the appellant held in the agency.

Joe v. Department of the Army, 62 M.S.P.R. 408 (1994), appellant was removed for inability to meet the physical requirements of her GS-5 Medical Data Technician position. In this case, despite an agency search there were no vacant positions at appellant's grade level which were available. The agency did not search for lower grade positions, which would have constituted a reasonable accommodation, because the appellant had informed her supervisor that such a demotion would have been unacceptable. The Board found, that the agency was not obligated to search for lower graded positions it knew appellant would reject. It also ruled that while the existence of an agency hiring freeze does not necessarily relieve the agency of its obligation to accommodate by reconsidering reassignment, it may constitute evidence of undue hardship. The Board remanded the case for reconsideration of what were at the time new 29 C.F.R. 1614.203 (g) regulations concerning reassignment.

EEOC Cases

Kitaura v. Henderson, Postmaster General, U.S. Postal Service, 99 FEOR 3200 (1999), the EEOC remanded the case back to the MSPB to properly consider reassignment. The EEOC agreed that because of appellant's wrist injury he could no longer perform the essential functions of a Distribution Clerk because he was medically limited to three hours of grasping per day. However, there was insufficient evidence to determine whether the appellant could have been reassigned to another vacant position for which he was qualified. The EEOC noted that the only evidence of record were the managers of the specific facility testifying that there were no funded vacant positions available for which he qualified. The EEOC held: "There is no objective evidence to support this determination, nor is there any evidence that a search for vacant positions at other facilities where petitioner could reasonably be reassigned was actually conducted." In footnote 2 of this decision the EEOC held that the 1992 Amendments to the Rehabilitation Act require that the federal regulations set forth at 1614.203 be interpreted in a manner consisted with the ADA and therefore the limited reassignment provisions of 1614.203(g) should not be employed in favor of the more liberal ADA standards which require, as set forth in the *EEOC's Enforcement Guidance on Reasonable Accommodation and Undue Hardship* consideration of nationwide reassignment. In ***Kitaura v. United States Postal Service,*** 83 MSPR 270 (1999) the MSPB remanded the case back to the AJ as directed by the EEOC. However, in a concurring opinion, member Beth S. Slave makes note the EEOC's order is contrary to many court decisions and places the burden on the agency to prove the nonexistence of a vacant position as opposed to the burden on the employee to prove the existence of a vacant funded position to which the employee is qualified.

Patterson v. Widnall, Secretary, Department of the Air Force 98 FEOR 3136 (1998) the EEOC differed from the MSPB and found disability discrimination when the agency failed to accommodate her mental condition (depressive disorder) by granting her request for leave or by trying to fulfill her request for reassignment. The employee had submitted several doctors notes to support a two week leave of absence which the agency felt were insufficient to support the request for leave. Regarding reassignment, there was no "systematic search for vacant positions", therefore the agency did not satisfy its duty to reasonably accommodate appellant.

Bassingthwaithe v West, Secretary, Department of the Army, 98 FEOR 3041 (1997) once the agency informs petitioner that attempts at reassignment were unsuccessful, petitioner has the burden of pointing to specific, vacant positions for which he was qualified.

Martin v. Runyon, Postmaster General, U.S. Postal Service, 98 FEOR 3031 (1997) the agency had no obligation to accommodate the appellant because he failed to establish a connection between his HIV status and the absences which led to his termination.

Doss v. Carlin, Archivist of the United States, National Archives and Records Administration, 98 FEOR 3030 (1997), the agency was not required to create a light duty position prior to

terminating the complainant when she was unable to perform the essential duties of her position as a GS-3 Archives Aid, due to a back injury.

Cole v. Runyon, Postmaster General, U.S. Postal Service, 97 FEOR 3095 (1997), an agency does not have to create a light duty position for an employee with a disability as a reasonable accommodation. Appellant was on light duty while on Workers Compensation. His compensation claim subsequently ended. He would have to file for a new OWCP claim. The agency determined that it did not have a regular and continuing light duty job and sent him home. Although the agency created a limited light duty position for the petitioner and kept him in that position while he had an active workers' compensation claim, the EEOC found that the agency was not required to maintain the position. The light duty position was not a regular agency position, but was one developed solely to provide work for him because he otherwise would have been entitled to compensation without employment. The agency did not have to create or maintain a light duty job solely for the appellant's benefit.

Randel v. Dalton, Secretary, Department of the Navy, 96 FEOR 3230 (1996) , the agency violated the Rehabilitation Act when it removed appellant who suffered from Major Depression from his GS-11 Computer Specialist position. The employee had been AWOL for failure to submit adequate medical documentation to support his absence. The removal was upheld by the MSPB but reversed by the EEOC. Unlike the Board, the EEOC found that he was disabled. Thee EEOC also found that the employee, who was having problems concentrating and relating to his supervisor, was removed without first conducting a "systematic search for vacant positions based upon petitioner's qualifications and his medical restrictions."

D. Knowledge of Agency

Court cases

Taylor v. Principal Financial Group, Inc., 93 F.3d. 155 (5th Cir. 1996), affirmed a grant of summary judgement to the employer on the grounds that plaintiff did not appraise his employer of any limitations resulting from his disability or any need for a reasonable accommodation. The plaintiff was the manager of the employer's El Pass, Texas office. He has been placed on probation and was given an annual appraisal that was critical of his failure to recruit a sufficient number of new agents. He had told his employer that he suffered from bipolar disorder but had not requested a specific accommodation. He was subsequently hospitalized and never covered enough to return to work. The court held "it is incumbent upon the ADA plaintiff to assert not only a disability, but also any limitations resulting therefrom. The plaintiff has a duty to request an accommodation. If the employee does not request an accommodation, the employer cannot be held liable for failing to provide one. An employee cannot remain silent and expect the employer to bear the initial burden of identifying the need for and suggesting an appropriate accommodation. "When dealing in the amorphous world of mental disability, we conclude that health-care providers are best positions to diagnose an employee's disabilities, limitations, and possible accommodations." Here there was only a vague request for a lessening of pressure and

lowering of objectives by the plaintiff. This was not enough to create a genuine issue of material fact for trial.

Burns v. City of Columbus, 91 F.3d 836 (6th Cir. 1996), under Section 504 of the rehabilitation Act, plaintiff did not establish an element of his prima face case that he was terminated from his position during his training period on the police force because he suffered form the disability of "reflex sympathetic dystrophy." Plaintiff had been injured during his training, but was not diagnosed with his condition until after his termination was recommended, at the end of his training period. The Board that recommended his termination did so because of his inability to perform the basic duties of an officer and a tendency to abuse official power. Plaintiff could not establish that the City knew or believed that he was disabled when it made the decision to terminate him, and therefore summary judgement was appropriate.

Miller v. National Casualty Co., 61 F.3d 627 (8th Cir 1995), the court affirmed a grant of summary judgement to an employer that was not told by the plaintiff that she suffered from a mental impairment. Plaintiff was absent for two weeks before being terminated. She indicated to her supervisor that she was under stress, had a nurse practitioner send a note diagnosing her as having "situational stress reaction" and her sister informed the employer that the plaintiff was "falling apart". None of the employee's applications revealed that she suffered from a mental impairment and she failed to disclose prior treatment of manic depression. The court held that the agency was not aware of the plaintiff's manic depressive condition until a week after her dismissal. The earlier statements were insufficient to place the defendant on notice that she was disabled. The defendant did not have any indication that plaintiff suffered from a mental illness. The need for accommodation was not obvious, and therefore the defendant could reasonably have required documentation of her need for accommodation. 29 C.F.R. 1630.9 (1996).

Hedberg v. Indiana Bell Telephone Co., 47 F.3d 928 (7th Cir. 1995), an employer who is unaware of an employee's disability generally cannot be held liable under the ADA. The ADA "does not require clairvoyance". Seeing the effect of some of the symptoms and taking into account performance-related behaviors is not acting based on knowledge of a disability.

MSPB Cases

Schultz v. United States Postal Service, 78 MSPR 159 (1998) although the agency had reason to believe that the employee might have a mental impairment, the agency did not discriminate against him for failure to meet attendance requirements, since the employee never clearly explained to the agency the nature and extent of his medical condition and what form of accommodation was needed.

McCray v. Department of Defense, 68 MSPR 186 (1995) *citing Donolin v. Department of Labor*, 95 FEOR 3182 (1995), the MSPB held that an agency's obligation to accommodate arises only when the disability is known. A "known" disability is one which in which relevant agency officials have actual, rather than imputed, knowledge or notice.

Sublette v. Department of the Army, 68 MSPR 82 (1995), appellant was properly removed for engaging in nine instances of improper misconduct, including violations of the command's policies on sexual harassment, obscene language, discrimination, and offensive comments. The agency proposed his removal. At the oral reply, the agency learned for the first time that appellant allegedly suffered from Post Traumatic Stress Depression and Major Depression which he asserted caused his misconduct. The MSPB held that as part of his prima facie case, appellant had to show that the agency knew about the disability *and* that the action appealed was based upon his disability. Since the agency learned of the appellant's purported impairment/disability after it proposed his removal, but before a final agency decision was rendered, it did have knowledge of the alleged disability. However, the appellant did not show that the removal was based upon the alleged disability. The agency asked that appellant to provide medial evidence to support his assertion. The report reflected that appellant did not meet all the criteria of PTSD and that while he did suffer from depression, his depression did not cause the misconduct. Thus, the removal was not based upon appellant's disability and it was properly sustained by the MSPB Administrative Judge.

EEOC Cases

Huxster v. Runyon, EEOC Appeal No. 01960997 (January 29, 1998) appellant failed to present evidence that the agency was aware of appellant's mental disability. ***See Stallworth v. Department of Veterans Affairs***, EEOC Request No. 05900416, (August 2, 1990); ***Landefeld v. Marion General Hospital***, Inc., 994 F.2d 1178 (6th Cir. 1993). While appellant asserts that the agency failed to present documentation concerning its awareness of his condition, the prima facie burden lies with the appellant to present sufficient evidence of the agency's knowledge. The mere assertion that appellant is "mentally challenged" is not enough.

Martin v. Runyon, Postmaster General, U.S. Postal Service, 98 FEOR 3031 (1997) the agency did not discriminate against the complainant when it terminated him for excessive absences when it was unaware that he suffered from HIV.

Rodgers v. Widnall, Secretary, Department of the Air Force, 96 FEOR 3151 (1996), the EEOC reversed itself and found that the agency was aware that complainant was suffering from a mental illness which caused his poor performance and misconduct. Complainant suffered from "schizophrenia-paranoid type, chronic with acute exacerbation. The agency had no express knowledge of his medical condition. The EEOC found overwhelming evidence, however, that appellant suffered from a mental illness given the sudden dramatic decline in her job performance and sudden bizarre behavior. The EEOC remanded the case for further investigation to determine whether the agency had satisfied its obligation to reasonably accommodate the complainant.

Gibson v. Dalton, Secretary, Department of the Navy, 96 FEOR 1008 (1995), although the appellant claimed that the agency failed to reasonably accommodate her asthma when it suspended her for refusing to work on an ordered cleaning detail, the EEOC found no

discrimination because the agency was unaware of her specific medical restrictions and she did not request an accommodation.

Donlin v. Reich*, *Secretary, Department of Labor, 95 FEOR 3182 (1995), appellant, a GS-12 Senior Claims Examiner in the Black Lung Program, Employment Standards Administration, who suffered from hypoglycemia and sleep disorder was demoted to a GS-9 Claims Examiner for poor performance. Appellant raised his medical conditions for the first time during the oral reply. The EEOC, upholding the MSPB, held that an agency's accommodation obligation arises only at the time the disability obligation is known. A known disability is one in which relevant agency officials have actual, rather than imputed, knowledge or notice. The EEOC focused on the decision available to the decision-maker at the time of his decision, as opposed to any information submitted to into the record during the processing of the appeal. The EEOC noted that the agency can hold a person with a disability to the same standard of performance as a person who is not disabled. The EEOC therefore upheld the demotion of appellant and concluded that the appellant had not set forth a prima facie case because he had not shown that the agency had knowledge of the disability prior to proposing its removal.

E. Causation

Court Cases

Williams v. Widnall, 79 F.3d 1003 (10th Cir. 1996), ADA does not require the agency to tolerate egregious behavior of a disabled employee caused by his disability where it does not tolerate similar misconduct from non-disabled employees.

Despears v. Milwaukee County, 63 F.3d 635 (7th Cir. 1995) the employer does not have to overlook crimes caused by the employee because they were caused by the employee's disability.

Schutts v. Bentley Nevada Corp., 966 F. Supp 1549 (D.C. Nev. 1997) citing cases from the First, Third, Fourth, Sixth, Seventh, Ninth and Tenth Circuits for the proposition that an employer may discipline/remove an employee for misconduct even if the misconduct is caused by the disability.

MSPB Cases

Hunter v. Department of the Air Force, 77 MSPR 589 (1998) the MSPB upheld the award of an arbitrator which mitigated the removal of a W.G.-10 Sheet Metal Mechanic (Aircraft) for making threatening statements that he was suicidal and that he would physically harm certain management officials by saying he would "get" these officials. The arbitrator found that the appellant was a disabled employee based upon his metal illness and that "management officials' reactions to his statements were caused by his mental illness" but that "the specific reason for his termination was not his disability" but his misconduct. The MSPB upheld the arbitrator's findings as well as his decision to mitigate the removal to keeping the appellant in a non-pay status with no back pay pending a finding by a board certified psychiatrist that he was fit for duty.

Roseman v. Department of the Treasury, 76 MSPR 334 (1997), employee, a Treasury Department Revenue Officer, failed to show sufficient causal connection between his back disability and the charged misconduct of failing to follow directive that he access IDRS computer system, and thus failed to establish disability discrimination. While employee stated he did not access the computer system because of his long injury-related absence from duty and because he needed further training, evidence established that he received training while on duty and that he could have accessed the system if he had chosen to do so. He further failed to establish a causal connection between his alleged disability and the directive that he make a minimum number of specified field office calls. While the employee argued that he could not drive safely as a result of side affects of medications, there was evidence that he made at least four field call specified in one of the directives and drove at least part of the way on a trip from his home to Florida during the time in question. Finally there was no causal connection between his back impairment and the charged misconduct of failing to follow directive that he spend a certain amount of time on particular work-related activities.

Vannoy v. OPM, 75 MSPR 170 (1997) even if prospective employee could establish that he was disabled, based upon posttraumatic stress disorder (PTSD), at the time of his misconduct involving theft of materials he was charged with disposing, and that his PTSD caused his criminal misconduct, his misconduct still disqualified him from Federal employment; prospective employee's criminal misconduct of concealment of stolen government property, hazardous waste materials that he was in charge of disposing, struck at the core of his job (particularly given his position as a supervisor) and the agency's mission, and was so egregious that it barred him from federal employment.

McCray v. Department of Defense, 68 MSPR 186 (1995) , the case was remanded to determine whether appellant's poor performance was caused by his post traumatic stress disorder, cyclothymic disorder and depression. The judge erred when he denied the testimony of appellant's former supervisor and union steward since these persons were knowledgeable about employee's performance and mental condition.

Sublette v. Department of Army, 68 MSPR 82 (1995), appellant did not establish that his misconduct was caused by his mental impairment (major depression) While his condition could cause an outbreak of anger, irritability, inappropriate remarks, some profanity and abusive statements, the misconduct he engaged in was not necessarily the kind of aggressive or irritable outburst spoken of by appellant and his psychiatrist. In fact there was no evidence that appellant was even hyper when some of the incidents arose. For example, when he made the statement :"boy we have some hot mamas in here today" as he ran his hand along back atop her bra strap, or when he referred to the colonel as a "smart nigger" and referred to an employee as a "little nigger" there was no evidence that he was feeling the effects of his disability.

EEOC Cases

Waterstrat v. Barram, Administrator, General Services Administration, 98 FEOR 3023 (1997) the agency did not discriminate against the employee for his claimed disability of depression, when it terminated him for poor performance or tardiness. The medical evidence, which consisted of the employee's family physician states only that his depression "can be severe enough to cause disability and to interfere in the performance of his job. A subsequent letter reflects only that the employee shows "signs" of "depression, anxiety and obsessional thoughts" and that on 4 occasions when he met with his patient "there were not overt signs of a formal thought disorder." **The EEOC further clarified, however, that even if there was a causal connection between his removal and his disability there would be no liability on the part of the agency. Despite the agency's best efforts, petitioner essentially refused to cooperate by failing to provide any information regarding his medical condition until after the agency had issued the notice of proposed removal. Citing *EEOC's Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities,* EEOC Notice No. 915.002 (March 25, 1997) the EEOC held that because an employer may hold all employees to the same performance and conduct standards and because reasonable accommodation is always prospective, the agency was not required to excuse the employee's past performance deficiencies and tardiness.** Thus, the EEOC upheld the MSPB's decision to sustain the employee's removal.

Maes v. Runyon, Postmaster General, U.S. Postal Service, 98 FEOR 1065 (1997) supervisor, who suffered from Bipolar disorder, and created a hostile and stressful working environment for his subordinates, by threatening them, pushing equipment towards them, yelling and screaming at them and changing work schedules after confrontations with employees, was properly demoted for his misconduct despite his disability. Citing the *EEOC's Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities,* EEOC Notice No. 915.002 (March 25, 1997), the EEOC found that even if the disability caused his misconduct, the agency was under no obligation to excuse it. The agency did consider his medical condition when deciding to mitigate his removal to demotion. Thus the EEOC upheld the decision of the MSPB to sustain the agency's decision to demote.

Clennon v. Cohen*, *Secretary, Department of Defense, 98 FEOR 1064 (1997), the employee , a teacher, engaged in disruptive behavior and received a letter of caution (LOC). The LOC informed appellant that if he wanted the agency to consider his disability when it made decisions affecting his employment, then he should provide certain detailed medical information, such as a diagnosis and prognosis from his physician and any recommendations for a reasonable accommodation. The employee did not comply with this request. The employee had informed the employer that he had a mental illness which sometimes cause him to be "out of control", that he was taking lithium and was under a psychiatrist's care but did not comply with the request for medical documentation. Subsequently, the employee engaged in additional disruptive behavior and received a written reprimand. The employee filed an EEO complaint alleging disability discrimination. During the investigation, almost one year after the misconduct, the employee submitted the detailed medical documentation originally requested by the employer. The EEOC found that the employee's failure to provide the medical information in a timely manner prevented the agency from determining whether he was entitled to reasonable accommodation and what that

accommodation might be. Therefore, the agency did not discriminate when it disciplined the employee for his disruptive behavior. Moreover, citing the *EEOC's Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities,* EEOC Notice No. 915.002 (March 25, 1997), it held that since such discipline would have been imposed on non-disabled the employee was properly disciplined for his misconduct.

Smith v. Shalala, Secretary, Department of Health and Human Services, 97 FEOR 3201 (1997), the EEOC concurred with the MSPB's determination that the petitioner's removal was not the result of disability discrimination. Appellant failed to establish that he suffered from a seizure disorder as he claimed, and even if he was an individual with a disability, he did not show that his condition was the cause of the disorderly conduct and threats that led to his removal.

Dixon-Smith v. Runyon, Postmaster General, Unites States Postal Service, 97 FEOR 3154 (1997), the employee was demoted for failure to maintain proper security for the agency. Appellant left the safe he was responsible for unlocked , and requested that a subordinate remove certain stock from the safe in violation of security procedures. An audit of main stock accountability found a shortage of $ 4,877.58. Appellant was mentally disabled (depression, dissociative identity disorder and other mental illnesses). She asserted that her medical condition caused her to be forgetful but offered no meaningful medical evidence between her mental disabilities and her misconduct. The EEOC went on to say, however, that even assuming a nexus between her misconduct and her disability, the agency did not discriminate against her when it demoted her. Citing the *EEOC's Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities,* EEOC Notice No. 915.002 (March 25, 1997) the EEOC held "an employee may discipline an employee with a disability for engaging in . . . misconduct if it would impose the same discipline on the employee without a disability." If the conduct standard were not job-related and consistent with business necessity, or applied inconsistently, the employer's actions against an individual with a disability could be violative of the Rehabilitation Act. This was not the case in this instance thus the demotion was sustained.

Morgan v. Runyon, U.S. Postal Service, Citing its recently issued *Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities,* EEOC Notice No. 915.002 (March 25, 1997) the EEOC found that the petitioner failed to show that his removal was harsher treatment than would have been received by nondisabled employees who, like petitioner, removed checks from the mailstream to convert to their personal use.

Ferrell v. West, 1997 FEOR 3127 (1997) employee who engaged in threatening conduct was properly removed from his computer specialist position. The employee's mental disability did not shield him from the consequences of his misconduct. The EEOC held that one who engages in abusive and threatening misconduct is not a qualified disabled employee. Citing the *EEOC's Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities,* EEOC Notice No. 915.002 (March 25, 1997) the EEOC sustained the removal.

Starling v. Runyon, Postmaster General, U.S. Postal Service, 97 FEOR 3082 (1997), employee suffering from diabetes did not establish a nexus between her diabetes and absence from the workplace or any of the agency's actions. The employee did establish a nexus between her major depression and her absence in the workplace and the decision of the agency to order a fitness for duty examination. There was no discrimination, however, since the agency did not treat complainant less favorable than other employees in this case.

Dougherty v. West, Secretary of Army, 96 FEOR (1996), the EEOC upheld the decision of the MSPB and ruled that appellant's removal was for good cause and did not constitute disability discrimination. The EEOC found no nexus between appellant's mental disabilities (generalized anxiety disorder, personality disorder, major depression/dysphemia) and the misconduct that was the basis for her removal. It also rejected her argument that the misconduct was caused by the different medications she was taking.

Davidson v. Perry, Secretary, Department of Defense, Office of Dependents Education, 96 FEOR 3028 (1995), complainant must establish a nexus between her disability (Asthma) and her unacceptable performance. Complainant failed to show that there was any reasonable accommodation which would have permitted her to perform the essential duties of her teacher position. The accommodations complainant sought, assistance of an aide and suspension of bus driver duty, were speculative and there was no basis to believe that his performance would have improved with these accommodations.

F. Undue Hardship

Court cases

Willis v. Conocopo Co. 108 F.3d 282, 286 n.2 (11th Cir. 1997), the two issues, reasonable accommodation and undue hardship are not the same. The question of whether an accommodation is reasonable, (though it must be determined in a given set of specific facts) is more of a "generalized" inquiry than the question of whether a resulting hardship for the employer is "undue".

Borkowski v. Valley Central School District, 63 F.3d 131 (2nd Cir. 1995), for purposes of the Rehabilitation Act, the term "undue hardship" is a relational term; as such it looks not merely at the cost the employer is asked to assume, but also to benefits to others that will result; thus the burden is on the employer to engage in a cost-befit analysis, considering factors listed in the regulations, which includes consideration of the industry which the employer is involved, as well as the individual characteristics of the employer.

Bryant v. Better Business Bureau of Maryland, 923 F.Supp. 720 (D. Md. 1996), although an employer is "not required to determine with mathematical certainty" that an accommodation would cause an undue hardship, an employer must have a sufficient factual basis in order to succeed in establishing an undue hardship defense.

MSPB Cases

Schrodt v. United States Postal Service, 79 MSPR 609 (1998) a proposed accommodation may constitute an undue hardship if it requires the agency to violate a non-discriminatory term of the collective bargaining agreement. In this case, the request for a reassignment to a light duty assignment did not violate the contract.

EEOC Cases

Taylor v. Daley, Secretary of Commerce, 97 FEOR 1323 (1997), the EEOC found that the proposed accommodation of the disabled employee (incomplete paralysis) to build a level covered passage between two buildings would cause an undue financial burden on the agency. The cost of the project was $500,000.00 and the agency was already over its building construction/maintenance budget.

Feris v. Browner, Administrator, Environmental Protection Agency, 97 FEOR 3021 (1997), the agency discriminated against the complainant based upon his disability (deafness) when it did not ensure he had an interpreter for all important work-related meetings. The employee had proved that the need for an interpreter on short notice was necessary for him and others to perform their job. The agency had argued it would have caused an undue hardship to hire a permanent interpreter based upon a budget freeze and budget shortfalls. The EEOC questioned the validity of this budget shortfall. It further concluded, given the overall size of the agency that the cost of hiring a full-time interpreter would not be an undue hardship. "Congress. . . clearly intended the federal government to undertake measures that would involve more than a de minimis cost on behalf of disabled employees.

G. Persons Addicted to Drugs or Alcohol

EEOC Cases

Johnson v. Babbitt, 96 FEOR 3123 (1996) the EEOC shall not require agencies to provide a firm choice between treatment and removal prior to taking an adverse action. The EEOC held that the Rehabilitation Act Amendments of 1992 required that Federal employers apply the same standards as private sector employers under the Americans with Disabilities Act (ADA) of 1990. The ADA, and the EEOC's implementing regulations provide that an employer may hold alcoholic employees to the same requirements for acceptable conduct and performance as it holds non-disabled employees. Therefore, the EEOC reasoned that while the agency was bound to consider reasonable accommodations, there could be no requirement for agencies to excuse misconduct or poor performance by alcoholic employees by requiring a firm choice between treatment and removal prior to taking an adverse action.

Hill v. Runyon, Postmaster General, U.S. Postal Service, 97 FEOR 3207 (1997) the EEOC concurred with the MSPB's decision that the petitioner's removal was not based on disability

discrimination. It noted that individuals such as the petitioner, who are currently engaged in the illegal use of drugs, are specifically excluded from the protections of the Rehabilitation Act.

MSPB Cases

Humphrey v. Navy, 76 MSPR 519 (1997) employee's 31 day suspension was reversed where the agency violated its own regulations which required abeyance and firm choice rather than discipline. Where alcoholic employee shows that he has a right to accommodation under agency's own rules, collective bargaining agreements, or policy, and such right has been denied, he has proven a claim of harmful procedural error rather than disability discrimination.

Walsh v. Postal Service, 74 MSPR 627 (1997), appellant, an alcoholic employee, was removed for throwing away over 1,000 pieces of mail. The MSPB reiterated that it was no longer required to provide a firm choice between treatment and removal and upheld the removal despite the fact that appellant had placed himself in a detoxification program after engaging in his misconduct. The MSPB decided to uphold the removal because of the seriousness of the offense. The MSPB did indicate, however, that it will consider mitigating a penalty where an alcoholic employee or other employee with a physical or mental impairment which causes misconduct, shows potential for rehabilitation by seeking treatment.

Kimble v. Department of the Navy, 70 M.S.P.R. 617 (1996), The MSPB agreed with the EEOC's decision in *Johnson, supra.* ***See Coates v. Department of the Navy****, 74 MSPR 362 (1997);* ***Bland v. Department of the Navy***, 71 M.S.P.R. 388 (1996); ***Todd v. Department of Justice,*** 71 M.S.P.R. 326 (1996).

Schulte v. Department of the Navy, 72 MSPR 466 (1996) current illegal drug use is no longer covered as a disability under the Rehabilitation Act.

Court cases

Burch v. Coca Cola Co., 119 F.3d 305, 320 n.14 (5th Cir. 1997), ADA does not require employers to excuse violations of uniformly-applied standards of conduct by offering alcoholic employee a firm choice between treatment and discipline. "[A] 'second chance' or a plea for grace is not an accommodation as contemplated by the ADA." Employers are under no obligation to accommodate misconduct that is the product of an employee's alcoholism. Section 12114(c)(4) of the ADA, unlike the pre-1992 Rehabilitation Act, does not require employers to excuse violations of uniformly-applied standards of conduct by offering an alcoholic employee a "firm choice" between treatment and discipline. Compare Fuller v. Frank, 916 F.2d 558, 562 (9th Cir.1990) (discussing firm-choice rule); Rodgers v. Lehman, 869 F.2d 253, 259 (4th Cir.1989) (same), with Johnson v. Babbitt, EEOC No. 03940100, 1996 WL 159072 (EEOC Mar. 28, 1996) (finding 1992 amendment to Rehabilitation Act, 29 U.S.C. S. 791(g), which incorporated section 12114(c)(4), eliminated the requirement that an employer provide a "firm choice" as an

accommodation. But cf. Office of the Senate Sergeant at Arms v. Office of Senate Fair Employment Practices, 95 F.3d 1102 (Fed.Cir.1996) (finding that amended Rehabilitation Act obliged employer to provide leave for treatment to a disabled alcoholic as a reasonable accommodation, but did not require a "retroactive accommodation" by excusing misconduct).

Office of the Senate Sergeant at Arms v. Office of Senate Fair Employment Practices, 95 F.3d 1102 (Fed Cir. 1996) an employee in the Office of the Senate Sergeant of Arms covered under the Government Employee Rights Act (GERA) who had abused leave procedures caused by his alcoholism was disciplined and unilaterally placed on a last chance agreement which provided for the employee to receive treatment for his disease. The agency did not, however, expunge his disciplinary record. The appellant argued that his record should have been expunged and that he should have been given a "fresh start." The Federal Circuit disagreed. It found, without reference to *Johnson* or *Kimble* that under the Americans with Disabilities Act (ADA) an agency is permitted to hold an employee who is an alcoholic to the same standards as non-alcoholic employees. Thus, the discipline was appropriate. The Federal Circuit also held, however:

> . . . .provision of a firm choice between treatment and discipline is consistent with the statutory requirement of a reasonable accommodation of an individual with a disability. Treatment would seem to be essential to any accommodation for alcoholism. If an individual refuses treatment when offered, then discipline is appropriate. Singer was entitled to a reasonable accommodation consisting of a prospective opportunity to be rehabilitated.

Id. at 1107. The Federal Circuit held that the OSSA provided the employee with such an accommodation when it advanced him leave to obtain in-patient treatment, and it allowed him to perform his job on a restricted-duty status while he continued his recovery. While the employee was entitled to receive a "prospective opportunity to be rehabilitated", he was not entitled to a "retroactive accommodation" that is a clean disciplinary record or "fresh start." Thus, the court upheld the agency's action.

H. Medical Inability to Perform/Direct Threat

Court cases

Bragdon v. Abbott, 118 S.Ct 2196 (1998) patient infected with HIV brought an action under the ADA against a dentist who refused to treat her in his office. The district court and the First Circuit Court of Appeals granted summary judgement in favor of the plaintiff, finding her disabled but concluded as a matter of law that she did not pose a "direct threat" to the dentist. The Supreme Court found that the plaintiff was an individual with a disability but remanded the case to the lower courts for further fact finding on the issue of "direct threat".

The ADA defines a direct threat to be a medical condition which poses a "significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or

procedures or by the provision of auxiliary aids or services" 28 U.S.C. 12182(b)(3). Because few, if any, activities in life are risk free, the ADA does not ask whether a risk exists, but whether it is significant. The existence, or nonexistence of a significant risk must be determined from the standpoint of the person who refuses to give the treatment or make the accommodation. But that risk assessment must be based upon medical or other objective evidence. As a health care professional, the dentist had the duty to assess the risk of infection based on the objective, scientific information available to him and others in his profession. His belief that a significant risk existed, even if maintained in good faith, did not relieve the dentist from liability.

The court must decide whether the dentists action to deny treatment at his office was reasonable in light of the available medical evidence. In assessing the reasonableness of his actions, the views of the U.S. Public Health Service, Center for Disease Control, and the National Institutes of Health, are of special weight and authority. The views of these organizations are not conclusive, however. A health care professional who disagrees with the prevailing medical consensus may refute it by citing a credible scientific basis for deviating from the accepted norm.
The court's reliance on the CDC Dentistry Guidelines and American Dental Association Policy on HIV was not definitive. The CDC Dentistry Guidelines do not definitively state that routine dental care for HIV patients is safe. The American Dental Association is a professional organization, not a public health authority. Efforts to clarify the dentists' ethical obligations and to encourage dentists to treat patients with HIV may be commendable but the question under the ADA is one of statistical likelihood, not professional responsibility.

The petitioner dentist, however, also has provided questionable evidence to support his position. His medical expert was unable to set forth substantial medical evidence to support his case. While seven dental workers have possible occupational transmission of HIV the CDC was unable to ascertain the precise cause of their infections and whether it was caused by their contact with HIV patients in the course of providing treatment. Thus, the Supreme Court decided to remand the case for further exploration of the facts to ascertain the significance of the risk associated with dentists treating HIV patients. The remand does not foreclose the possibility that the Court of Appeals may reach the same conclusion it did earlier.

Equal Employment Opportunity Commission v. Amego Inc., 110 F.3d 135 (1st Cir. 1997), medical professional who improperly dispensed medications to her patients constituted a direct threat to the health and safety of her patients. Even under a “direct threat” analysis, the employee retains at all times the burden of persuading the jury either that he was not a direct threat or that reasonable accommodations were available.

Moses v. American Nonwovens, Inc., 97 F.3d 446 (11th Cir. 1996), cert. denied, 117 S. Ct. 964 (1997), upheld the removal of a former employee who had epilepsy because the employee’s continued employment would have posed a direct threat. The former employee did not dispute that there was a significant risk that he would have had seizures on the job. The court found that there was a substantial risk that the employee would be injured because his job was performed in the vicinity of heavy machinery.

EEOC v. Chrysler Corporation, 917 F.Supp. 1164 (E.D.Mich. 1996), Chrysler's policy of excluding from employment any individual with a blood sugar level of greater than 140 mg/dl. was found to violate the ADA. Chrysler failed to make the requisite individual assessment of an applicant's qualifications when it imposed this exclusionary policy.

MSPB Cases

Schrodt v. United States Postal Service, 79 MSPR 609 (1998), in removing an employee for physical inability to perform, an agency may not rely solely upon a showing that he has a physical disability; rather, it must establish a nexus between the employee's medical condition and observed deficiencies in his performance or conduct, or a high probability of hazard that his condition may result in injury to himself or others. The agency did not prove that employee suffering from patellar chondromalacia in both knees was physically unable to perform the duties of distribution clerk; medical evidence failed to relate employee's medical condition to specific duties of his position, and the agency never documented insufficient performance or deficiencies by the employee in performing his job. To exclude an employee from employment for risk of possible future injury, there must be a reasonable possibility of substantial harm, which is determined in light of the employee's work history and medical history; such a determination cannot be based merely on an employer's subjective evaluation, or, except in cases of a most apparent nature, merely on medical reports. The agency did not establish that the employee's knee condition which required that he walk with a cane posed a safety risk; there was no evidence, apart from the supervisor's subjective assessment, that alleged congestion in the work area, or supposed strings and rubber bands on the floor, constituted a serious threat to the employee's safety; moreover, the possibility that the employee might find it difficult to climb down stair to evacuate the building was speculative, inasmuch as his physical restrictions, which precluded climbing, did not preclude descending stairs.

Robinson v. Department of the Air Force, 77 MSPR 486 (1998), the agency removed appellant from her GS-5 Editorial Assistant position for "being unable to perform the duties of her position because of medical restrictions." The agency asserted that the permanent medical restrictions at issue -- inability to remain in a sitting position with head/neck in a fixed position for greater than 15 minutes at a time, and restricted repetitive use of the right arm--prevented her from performing several duties necessary to meet the minimum requirements of her position description. The employee articulated a reasonable accommodation when she requested that she either be reassigned from her GS-5 Editorial Assistant position or placed back in her former GS-5 Secretary position which she had no problems to fulfill and perform for 9 years. Therefore the agency established a prima facie case of disability discrimination. The agency, however, produced a list of jobs, including her former position, and eliminated them from reassignment consideration because of her disability. If the employer claims that the appellant is unable to perform these jobs, the burden is on the disabled employee to prove that she is capable of performing the essential functions of the position in question. An agency's obligation to accommodate includes reassignment to a vacant position at the same grade or level the essential functions of which the employee can perform, and if such a position is not vacant, an offer of reassignment to the highest

available grade or level below the employee's current grade is required. An agency is not, however, obligated to accommodate a disabled employee by permanently assigning him to light-duty tasks when those tasks do not comprise a complete and separate position. Here, the case was remanded to determine whether appellant was qualified to perform the essential functions of vacant position including her former Secretary position. While it could be inferred that employee could perform her previous position the employee presented no direct evidence that she could in fact perform this position.

Cole v. Department of Veterans Affairs, 77 MSPR 434 (1998) agency properly removed an employee with the disabling condition of arthritis, who was on LWOP for 2 years and intended to continue as such indefinitely.

Ellshoff v. Department of the Interior, 76 MSPR 54 (1997), the charge of medical inability to perform duties is distinct from the charge of unsatisfactory performance, and unlike the latter, requires medical evidence showing that the employee is incapacitated for particular duties due to a medical condition. In this case, the agency failed to prove its charge of medical inability to perform job duties due to depression, even if the employee did not adequately perform her job duties in six weeks prior to her removal and had been medically incapacitated during that time, since pre-removal medical evidence, including reports of her treating psychiatrist and of the agency's medical officer, showed that the employee was not incapacitated for work at the time of her removal, and the psychiatrist submitted additional post-removal medical evidence that reaffirmed his prior opinion.

Clark v. United States Postal Service, 74 MSPR 552 (1997) postal service employee with back impairment was improperly removed from his mail processor position for physical inability to perform the duties of his position. The MSPB found that there were reasonable accommodations which would have permitted the employee to perform his job that would not have caused an undue hardship. Because he couldn't bend, the appellant asked that his mail cart be raised a bit by adjusting the height of the cart legs and/or that the mail trays be placed on the top shelf, with the bottom weighed down by telephone books. The agency denied this simple request and the removal was reversed.

Spencer v. Department of the Navy, 73 MSPR 15 (1997) the appellant was improperly removed for medical inability to perform his position of GS-5 supply clerk due to his physical impairment of "sleep apnea". Appellant's own doctor concluded in a letter that appellant's "condition contributes to his day-time sleeping" and "could indeed be a hazard to his health as well as occupational responsibilities." The AJ upheld the removal finding that his medical condition frequently caused him to sleep at work, an impairment which the AJ found inherently dangerous. The Board, however, reversed the removal. **To remove an employee for medical inability to perform the duties of his/her position, the agency must establish either a nexus between his/her medical conditions and observed deficiencies in his/her performance or conduct, or a high probability of hazard when his/her condition may result in injury to himself or others because of the kind of work he or she does.** The agency failed to satisfy either test.

There was insufficient evidence of observed performance or conduct deficiencies because the agency had failed to prove that appellant had in fact slept on duty and his performance had been previously satisfactory. Moreover, the agency had not proven appellant's continued employment would result in a high probability of hazard. An employee's ability to perform his/her full duties without incident, is a significant factor in determining whether there is a high probability of hazard. Further, the doctor's report was not sufficiently detailed in that it did not support his opinion with any references to the specific duties of appellant's position. Finally, while appellant's physician did discuss appellant's medical restrictions, he did not expressly bar the appellant from his supply clerk position. Thus, there was insufficient evidence to sustain the removal.

Yates v. U.S. Postal Service, 70 M.S.P.R. 172 (1996) to meet its burden of showing that appellant was not physically able to perform his duties, the agency must establish a nexus between his medical condition and observed deficiencies in his performance or conduct, or a high probability of hazard when his condition may result in injury to him or others because of the kind of work he does.

EEOC Cases

Henry v. Henderson, Postmaster General, U.S. Postal Service, 99 FEOR 3254 (1999) agency subjected the appellant to disability discrimination when it found him medically unsuitable for his position without conducting an individualized assessment of his capabilities or considering whether he could be accommodated, and when it offered him a choice between disability retirement and termination. The EEOC found that appellant's severe degenerative arthritis in his knee rendered him an individual with a disability. It found that he was qualified to perform the job at the time of his nonselection and was therefore a qualified individual with a disability. The agency focused almost entirely on appellant's climbing restrictions, finding it would make him a danger to himself or others. However, this finding was based upon a speculative fear and was unsupported by the specific evidence in the record. The agency failed to conduct an individualized assessment of the appellant's capabilities without making an effort to determine whether the employee could be accommodated. When an employer makes a decision based upon the likelihood of future injury of the employee on himself or others a "direct threat" analysis must be employed. An employer does not have to retain an employee that causes a direct threat to the workplace. (29 C.F.R. 1630.15(b)(2). A direct threat is a "significant risk of substantial harm" which cannot be eliminated or reduced by reasonable accommodation. (29 C.F.R. 1630.2(r)). A determination as to whether an individual poses a direct threat cannot be based upon an employer's subjective evaluation or speculation, but must rely on objective, factual evidence, including the individual's experience in previous positions, and the opinions of medical doctors. See Appendix to 29 C.F.R. 1630. In this case there was no consideration of any reasonable accommodations. No consideration of restructuring the job (e.g. no consideration of substituting high bay cleaning with other duties to eliminate the health risk or continued light duty) and no consideration of reassignment from his current position. Regarding reassignment, an agency has no duty to create a new position for an employee, however, it must consider reassignment to a

vacant position for which the employee is qualified to perform. In this case, the agency made any attempt to find whether he could be reassigned to another job. Thus, the EEOC ordered reinstatement and remanded the case to determine the appropriate amount of compensatory damages in this case.

Nori v. Henderson, Postmaster General, U.S. Postal Service, 99 FEOR 3003 (1998) appellant was properly terminated because he constituted a direct threat to the safety of the workplace. Appellant had a "delusional disorder with grandiose and persecutory features." The psychiatrist found he was not fit for duty because he could not carry a weapon due to his potential for unpredictable and violent behavior. The psychiatrist continued that he could not be placed in a non-police position because he still could engage in violent behavior. The psychiatrist further held that appellant's prognosis was poor because he did not believe he had a mental condition that required treatment.

Maxwell v. West, Acting Secretary, Department of Veterans Affairs, 98 FEOR 3224 (1998) employee with heart condition posed a direct threat because he could not perform his job as a dental technician without endangering himself. Specifically, the employees doctor indicated that because of an implanted defibrillator implanted in his heart, he could receive a shock while working with dangerous equipment. An Industrial Hygienist and Safety Specialist were call in to examine if there was some way to accommodate appellant in a matter which would permit him to perform his job safely but could find none. They could find no jobs at his current level and offered him another job at the lower level but the appellant rejected the offer. Thus the agency satisfied its reasonable accommodation obligations.

Coogle v. Runyon, Postmaster General, U.S. Postal Service, 97 FEOR 1096 (1997), the agency discriminated against the complainant, an applicant for the position of Letter Sorter Machine Operator Trainee, when it failed to conduct an individualized assessment of whether he could perform the position he sought in spite of his ankle injury.

Flynn-Banigan v. Reno, Attorney General, Department of Justice, 96 FEOR 3104 (1996) (refusal to hire an applicant for Border Patrol Agent solely because he did not meet the medical standard of 20/70 uncorrected vision was remanded for further investigation to determine, in part, whether such a standard which established a “blanket exclusion”, was job- related.

Curry v. West, Secretary, Department of the Army, 96 FEOR 1100 (1995), the agency violated the Rehabilitation Act when it regarded appellant as disabled do to his knee and back injuries. a decision not to hire because of a predicted future injury must be based upon more than an elevated risk of injury, but on a reasonable probability of substantial harm if the employee performs the job. There must be an individualized assessment of appellant’s condition , taking into account the nature and duration of the risk, its severity (i.e. potential harm) and the probability of it occurring. The imminence of the risk should be considered as part of assessing its probability. The agency failed to prove a reasonable probability of substantial harm and therefore discriminated against the appellant.

I. Enforced Leave/Constructive Discharge or Suspension

Dancy Butler v. Department of the Treasury, 80 M.S.P.R. 421 (1998),If an employee who initiated his own absence requests to return to work within certain medical restrictions, and if the agency is bound by the rehabilitation Act to accommodate the medical condition and to allow the employee to return, the agency's failure to reasonably accommodate becomes a constructive discharge. When the agency does not make an express decision to suspend an employee for more than 14 days, the time in which the employee may file a timely appeal of constructive suspension begins to run when the employee has been absent for more than 14 days. An employee is not entitled to her appeal rights from a presumably voluntary employee-initiated action until she puts the agency on notice that she considers the action to be involuntary, or the circumstances show that the agency knew or should have known facts indicating that the action was involuntary.

Conover v. Department of the Army, 78 MSPR 605 (1998) employee raised non-frivolous allegation that her resignation was involuntary because of disability discrimination; the employee alleged that the agency's failure to accommodate her stress related disorders by putting an end to harassing treatment by a coworker, relocating her work station, or reassigning her, led her to resign. In cases where the employee has alleged that intolerable working conditions led to her resignation or retirement, the appropriate test for involuntariness is whether under all of the circumstances working conditions were made so difficult by the agency that a reasonable person in the employee's position would have felt compelled to resign or retire. An employee is entitled to notice of Board appeal rights from a presumptively voluntary action like a resignation if the employee placed the agency on notice that he considered the presumptively voluntary action to be involuntary, or if the agency was or should have been aware of facts indicating that the resignation was involuntary.

Schultz v. United States Postal Service, 78 MSPR 159 (1998), regardless of the status of an agency's inquiry concerning an employee's ability to perform, the employee has been constructively suspended if his absence is involuntary, i.e. at the direction of the agency.
Lohf v. United States Postal Service, 71 M.S.P.R. 81 (1996), an agency's placement of an employee on enforced leave for more than fourteen days, based on alleged physical or mental disability, constitutes a constructive suspension appealable to the Board. The key question in enforced suspension case is whether the agency or the appellant initiated the leave. Here the agency, after giving appellant a fitness for duty exam, placed the appellant on enforced leave and prevented him from returning to duty until he completed a ninety-day inpatient treatment program for PTSD.

Baker v. U.S. Postal Service, supra, appellant, while performing as a Reservist in the U.S. Army injured his toe in a manner which prevented him from carrying out the essential functions of his Postal Service position of Mailhandler. In accordance with 38 U.S.C. 4304(d) where the appellant was unable to perform his prior position, but was qualified to perform another position, upon his request, he was entitled to perform another position he was qualified for and was within his medical restrictions. Appellant made a non-frivolous allegation that he was able and willing to

return to work within certain medical restrictions. Once he did so the burden of production shifted to the agency to show either that there was no work available within appellant's medical restrictions or that it offered such work and he declined it. If the agency produces such evidence the appellant must then present sufficient rebuttal evidence to meet his overall burden of persuasion. The agency did not carry its burden of production. Appellant's supervisor testified that she did not know whether there was work within appellant's medical restrictions and the agency did not offer to allow appellant to return to work. Accordingly, the case was remanded to determine whether the agency constructively suspended the appellant.

J. Medical Evidence

Court of Appeals Cases

McCreary v. Libbey-Owens-Ford Co., (7th Cir., February 6, 1998), plaintiff's representations to Social Security Administration are not irrelevant to determining whether he is qualified individual with a disability under ADA, but are some evidence of plaintiff's ability to perform essential functions of job; to establish genuine issue of material fact, plaintiff must come forward with evidence, other than those representations, that tends to show that plaintiff can, with or without reasonable accommodation, perform essential functions of job.

McConathy v. Dr. Pepper/Seven Up Corporation, Case No. 97-10037 (5th Cir. January 7, 1998) employee was judicially estopped, by her statement in application for social security disability benefits, from arguing that she was qualified person with a disability.

MSPB Cases

Ellshoff v. Department of the Interior, 76 MSPR 54 (1997), in determining whether the employee was incapacitated for work due to depression at the time of her removal on the charge of medical inability to perform, the opinion of the agency's medical officer had to be interpreted in the context of the treating psychiatrist's reports, since the medical officer did not examine or treat the employee but was merely interpreting the reports of the treating psychiatrist. Any ambiguity in the medical report would be construed against the agency since the agency bears the burden of proving the charge of medical inability to perform. In this case, the pre-removal medical evidence showed that the appellant was not incapacitated for work due to depression at the time of her removal. The appellant also introduced post-removal medical evidence from his doctor, reaffirming his prior opinion that he was medically able to perform his job. Post-removal evidence may be considered by the Board in reviewing a charge of medical incapacity, to the extent that it "sheds light on the circumstances at the time the agency act." The Board will even consider evidence of medical recovery that occurs after the employee's removal.

Jackson v. U.S. Postal Service, 73 MSPR 619 (1997), the agency erred when it removed a custodian because of his severe allergies to certain chemicals. It misinterpreted medical evidence submitted by her physician and had not made a meaningful effort to reassign the appellant. The

medical evidence reflected that appellant could not perform in custodial jobs because she would come in contact with certain chemicals which would adversely affect her health. The medical evidence did not conclude, however, that she required an environment free from chemicals. In this case appellant suffers from *dermatitis* which prohibited her from touching certain chemicals. She has no allergic reaction inhaling such cleaning chemicals when normally used in an the office environment. Therefore, she could have performed the jobs of Mail Processor or other noncustodial positions. The agency never meaningfully explored reassignment to such positions and therefore violated the Rehabilitation Act of 1973.

Flanagan v. United States Postal Service, 56 MSPR 134 (1992) the medical documentation did not support that the appellant was a qualified disabled person. The conclusion that he would not harm himself or others because of his paranoid schizophrenia was based upon a general analysis of his work history and did not reference or explain appellant's recent assault of his supervisor.

Fuentes v. United States Postal Service, 54 MSPR 4 (1992) appellant submitted many letters from his physician documenting that appellant suffered from chronic schizophrenia, paranoid type. The doctor recommended that appellant be placed in an environment free from work pressures and away from the public. The MSPB gave these letters little weight since they did not indicate that appellant's condition substantially limited a major life activity, did not provide a prognosis and contained little objective analysis of the condition.

EEOC Cases

Coogle v. Runyon, Postmaster General, U.S. Postal Service, 97 FEOR 1096 (1996) the agency violated the Rehabilitation Act because it did not base its decision to reject complainant's application on substantial information about the individual's work and medical history, and it may chose instead to rely on its own incomplete and subjective evaluation. The medical officer recommending that the complainant could not perform the position because of his ankle injury, had no knowledge of how frequently and for what lengths of time appellant would be required to stand, walk, or lift when performing the Letter Sorter Position. When complainant's doctor submitted a medical report reflecting he could perform the job, no one contacted the doctor to clarify why the difference in opinion existed. They also rejected appellant's suggestion for a third medical examination.

Hilton v. Runyon, Postmaster General, U.S. Postal Service, 94 FEOR 3082 (1993) the EEOC remanded to determine whether the agency discriminated against an appellant suffering from epilepsy when it insisted that appellant sign a general release of all medical records relating to her seizure disorder and removed her when she failed to sign it. Appellant had what appeared to be a clerical position. The agency claimed that the job required climbing and exposure to hazardous equipment. Appellant asserted it was a desk job with only occasional trips to the shop and work area. The EEOC remanded for further investigation but clearly sent the message that if the position was predominantly a desk job they would find discrimination. They remanded to determine precisely why the medical officer determined he had to have the general release signed,

what the job entailed, information regarding the specific machinery appellant would come in contact with, the frequency of such contact, the configuration of the office and proximity to dangerous equipment, the degree to which appellant's disability would impact on the safety of others and the basis for concluding that the job required climbing.

K. Compensatory Damages

Barber v. Nabors Drilling U.S.A., Case No. 20102 (5th Cir. 1997), good faith dispute existed as to whether full medical release would be necessary for employee to perform essential functions of his job, and employer's insistence that employee obtain full medical release before returning to work thus was not evidence of malice or reckless indifference that could form basis for punitive damages instruction in ADA action.

Lilian v. Runyon, Postmaster General, U.S. Postal Service, 97 FEOR 3070 (1996) appellant's disability prevented him from being exposed to noise levels greater than 50 decibels and the agency discriminated when it failed to measure the noise level in his newly assigned area to meet his restrictions. However, the EEOC determined that appellant was entitled to no compensatory damages because the agency made a good faith effort to accommodate the appellant.

Spencer v. Department of the Navy, 82 MSPR 149 (1999) employee erroneously regarded as disabled was not entitled to compensatory damages as a matter of law because no accommodation was required.

L. Mitigation

Bond v. Department of Energy, 82 MSPR 534 (1999) employee who suffered from gastroesophageal reflux disease (GED) failed to show that his impairment, or the medication he took for it, Prilosec, substantially limited a major life activity, so as to render him disabled, and (2) penalty of removal for sleeping while on duty would be mitigated to a 60 day suspension, where the employees medical condition and the side effects of the prescription drug he was taking for his condition played a part in the charged misconduct (10 specifications of AWOL and 9 specifications of sleeping on the job), and prior disciplinary actions were recent and based upon the same type of misconduct. The Board found that the misconduct was caused largely by his medication which made him sleepy. Right before his removal was proposed he moved to within ten minutes of the agency and he is now taking a new medication that does not cause sleepiness. The Board found that appellant's seeking treatment for his medical problems indicates a potential for rehabilitation. The Board also concluded that because appellants medical conditions were present during earlier misconduct that it did not qualify as an aggravating factor under the particular circumstances of this case.

Hunter v. Department of the Air Force, 77 MSPR 589 (1998) the MSPB upheld the award of arbitrator which mitigated the removal of a W.G.-10 Sheet Metal Mechanic (Aircraft) for making threatening statements that he was suicidal and that he would physically harm certain management officials by stating he would "get" these officials. The arbitrator found that appellant was in need of medical care but that neither party provided sufficient evidence of whether he could be accommodated. He found that the appellant was not fit for duty in October of 1995 around his removal but directed the agency to reinstate the appellant to his previous employment status with attendant rights and benefits as of the date of his removal. However, the arbitrator instructed the agency not to return him to work until he was certified fit for duty by a qualified or board certified psychiatrist. The arbitrator ruled that the appellant would not be entitled to back pay because he would not be considered fit for duty between the date of his removal and the date a certified psychiatrist stated that he was fit for duty. The Board upheld this decision, finding that the arbitrator properly considered the Douglas factors in considering the appropriateness of the penalty.

Roseman v. Department of the Treasury, 76 MSPR 334 (1997)**,** evidence that employee's medical condition played a part in charged conduct is ordinarily entitled to considerable weight as a mitigating factor. Even if the employee's medical condition does not rise to the level of a disability, if agency knew about it before taking the action at issue, the Board may consider the in determining the appropriate penalty. Here there was no evidence of a causal connection between the employee's back impairment and his insubordinate misconduct.

Walsh v. Postal Service, 74 MSPR 627 (1997), appellant, an alcoholic employee, was removed for throwing away over 1,000 pieces of mail. The MSPB reiterated that it was no longer required to provide a firm choice between treatment and removal and upheld the removal despite the fact that appellant had placed himself in a detoxification program after engaging in his misconduct. The MSPB decided to uphold the removal because of the seriousness of the offense. The MSPB did indicate, however, that it will consider mitigating a penalty where an alcoholic employee or other employee with a physical or mental impairment which causes misconduct, shows potential for rehabilitation by seeking treatment.

Sublette v. Department of the Army, 68 MSPR 82 (1995), mitigation of penalty of removal to demotion to highest available nonsupervisory position was justified in the case of a supervisor who engaged in misconduct, including sexual harassment, obscene language, discrimination, and offensive comments. Although the employee failed to show that he was mentally disabled, he did show that the agency was aware before removing him that he had some degree of mental impairment, the employee had over 26 years of satisfactory service, he showed potential for rehabilitation in that he embarked on a treatment program of antidepressants and psychotherapy, and the agency failed to apply any progressive discipline.

M. Post-Removal Evidence of Recovery

Ellshoff v. Department of the Interior, 76 MSPR 54 (1997), post-removal evidence may be considered by the Board in reviewing a charge of medical incapacity, to the extent that it "sheds light on the circumstances at the time the agency act." The Board will even consider evidence of medical recovery that occurs after the employee's removal.

Castillas v. Department of the Air Force, 64 M.S.P.R. 627 (1994), the MSPB will consider evidence of an employee's medical recovery that first came into existence subsequent to the removal action and was not considered by the agency in effecting the removal, since removal of a fully recovered employee would not promote the efficiency of the service. However, absent clear evidence of complete recovery, the appellant shall not be returned to duty. **See *Morgan v. U.S. Postal Service,*** 48 M.S.P.R. 607 (1991); ***Day v. Department of the Army,*** 47 MSPR 617 (1991); ***Street v. Department of the Army***, 23 MSPR 335 (1984).

N. The MSPB Has The Authority to Order a Medical Examination

Hasler v. Department of the Air Force, 79 MSPR 415 (1998) (Member Slave dissenting) overruling ***Brumley v. Department of Transportation***, 46 M.S.P.R. 666 (1991), the MSPB reversed itself and found that the Board has the authority to order a mental examination where it meets the requirements of Rule 35 of the Federal Rules of Civil Procedure. Thus, the Board held that where an employee requested 500,000.000 for emotional distress, a Rule 35 ordered mental or physical examination is an appropriate method of discovery. See also ***Carpenter v. Glickman***, 95 FEOR 3229 (1995) in which the EEOC remanded a disability discrimination case back to the agency to conduct a supplemental investigation to review all relevant medical records concerning the complainant's claim for compensatory damages.